

# Re-making Distinctions on the Basis of Sex: Must Gay Women Be Admitted to the Military Even If Gay Men Are Not?

DIANE H. MAZUR\*©

*Even though recent events have again highlighted stark differences between men and women in the military, both sides of the "gays in the military" debate have always assumed that gay men and gay women should be treated identically. The rational basis offered in support of the "Don't Ask, Don't Tell" policy, however, raises the question whether the policy can constitutionally be applied to women under the Equal Protection Clause. The ban against gays in the military was necessary, according to Congress, because the presence of gay men would impair unit bonding and cohesiveness. Congress's primary concerns were grounded in fears of aggressive sexual behavior and retaliatory violence. Yet none of these concerns applied to women. Women are still largely excluded from combat duty, and no one contemplated that aggressive or violent behavior would arise in all-female groups. Even if the military has offered a rational basis for the exclusion of gay men from the military, a rational basis that is relevant only to men cannot justify the exclusion of women. As a result, equal protection of women may actually require an unexpected distinction on the basis of sex, one that would admit gay women to the military even if gay men are excluded.*

## I. INTRODUCTION

Must gay women be admitted to the military even if gay men are not? This question, to my knowledge, has never been asked. The exclusion of gay servicemembers from the military has always been assumed to apply identically to both men and women, without any thought about whether or not it should. The recent congressional debate over the treatment of gay servicemembers left behind a trail of thousands of pages,<sup>1</sup> presumably setting out a rational basis for

---

\* Copyright © 1996 by Diane H. Mazur. Associate Professor, University of Florida College of Law. J.D., University of Texas School of Law, 1988. Captain, U.S. Air Force, 1979-1983. I thank Justin Witkin for his helpful research assistance.

<sup>1</sup> Both the Senate and the House of Representatives held hearings before codifying the military's exclusionary policy. See *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong. (1994) [hereinafter *Senate Hearings*]; *Department of Defense Authorization for Appropriations for Fiscal Year 1994 and the Future Years Defense Program: Hearings on S. 1298 Before the Senate Comm. on Armed Services*, 103d Cong. (1994) [hereinafter *Senate Defense Authorization Hearings*]; *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services*, 103d Cong. (1993) [hereinafter *House Armed Services Hearings*]; *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings*

a "Don't Ask, Don't Tell" policy<sup>2</sup> that would affect all gay servicemembers, men and women alike.

The fundamental justification for the exclusionary policy is found in the concept of "unit cohesion," those "bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members."<sup>3</sup> Gay servicemembers must be barred from military service because their straight colleagues are unwilling or unable to work alongside those who fail to abide by the military's own "laws, rules, customs, and traditions,"<sup>4</sup> including the military's "long-standing" prohibition against homosexuality.<sup>5</sup> "The armed forces must maintain personnel policies that exclude persons whose presence . . . would create an unacceptable risk to the . . . high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."<sup>6</sup>

Women were almost completely absent from the entire debate. Congressmen and military men focused relentlessly on whether the presence of gay men would impair bonding and cohesiveness among men in all-male combat units. This country's most well-known military sociologist, Professor

---

*Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services*, 103d Cong. (1993) [hereinafter *House Military Forces Hearings*]. Congressional reports also memorialized the debate. See S. REP. NO. 103-112 (1993) [hereinafter *SENATE REPORT*]; H.R. REP. NO. 103-200 (1993) [hereinafter *HOUSE REPORT*]. Lastly, both Congress and the Department of Defense commissioned studies reviewing the exclusionary policy. See NATIONAL DEFENSE RESEARCH INST., *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT* (1993) [hereinafter *RAND REPORT*]; U.S. GEN. ACCOUNTING OFFICE, PUB. NO. NSIAD-92-98, *DEFENSE FORCE MANAGEMENT: DOD'S POLICY ON HOMOSEXUALITY* (1992) [hereinafter *GAO REPORT*]; U.S. GEN. ACCOUNTING OFFICE, PUB. NO. NSIAD-92-98S, *DEFENSE FORCE MANAGEMENT: STATISTICS RELATED TO DOD'S POLICY ON HOMOSEXUALITY* (1992) [hereinafter *GAO STATISTICS*].

<sup>2</sup> See 10 U.S.C. § 654 (1994).

<sup>3</sup> 10 U.S.C. § 654 (a)(7) (1994).

<sup>4</sup> 10 U.S.C. § 654 (a)(8)(B) (1994).

<sup>5</sup> 10 U.S.C. § 654 (a)(13) (1994).

<sup>6</sup> 10 U.S.C. § 654 (a)(14) (1994). Both federal circuit courts that have considered the "Don't Ask, Don't Tell" policy on the merits held that the "unit cohesion" justification provided a rational basis for the exclusion of gay servicemembers. See *Richenberg v. Perry*, 97 F.3d 256, 262 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 934 (4th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 358 (1996). "Should the judiciary interfere with the intricate mix of morale and discipline that fosters unit cohesion, it is simply impossible to estimate the damage that a particular change could inflict upon national security . . . ." *Thomasson*, 80 F.3d at 926.

Charles Moskos,<sup>7</sup> carefully limited his congressional testimony to gay men with the observation that "if we had an all female force we probably would not be having these hearings today."<sup>8</sup> Even if the military has articulated a rational basis for its exclusionary policy in general, the question remains whether a rational basis that is relevant only to men can justify the exclusion of women. The issue is even more important to address if the policy, justified by male concerns about the behavior of other men, will ultimately be enforced disproportionately against women.

In no way does the position taken in this Article advocate the exclusion of gay men from the military. Reliance on unit cohesiveness is just a more sanitized explanation for a policy that excludes gay servicemembers because some of their colleagues are disapproving or fearful,<sup>9</sup> "a facile way for the ins to put a patina of rationality on their efforts to exclude the outs."<sup>10</sup> The insincerity of the policy's justification reveals itself when the military's concern with unit cohesiveness waxes and wanes depending on its purpose. Unit cohesiveness is critically important when its purpose is to bar gay servicemembers. It is apparently less important, though, when the issue is cohesiveness between soldiers of different races. If the military was truly concerned about unit cohesiveness, it would not dismiss the gravity of openly racist behavior among soldiers by characterizing it as a free-speech issue.<sup>11</sup>

---

<sup>7</sup> Professor Moskos, a sociologist at Northwestern University, has written the classic work in the field, CHARLES C. MOSKOS, JR., *THE AMERICAN ENLISTED MAN: THE RANK AND FILE IN TODAY'S MILITARY* (1970).

<sup>8</sup> *Senate Hearings*, *supra* note 1, at 349.

<sup>9</sup> The recent decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996) may weaken the military's justifications for the exclusion of gay servicemembers. In striking down a state constitutional amendment that would have denied all legal protections to gay citizens, the Court characterized the amendment as "inexplicable by anything but animus toward the class that it affects." *Id.* at 1627. The "personal or religious objections" of heterosexuals to any association with gay citizens failed to provide a rational basis for the legal restrictions imposed. *Id.* at 1629. While *Evans* may call into question the military's reliance on personal animosity as a justification for its exclusionary policy, the Court's opinion leaves the door open to narrowly-tailored restrictions. The comprehensiveness of the legal disability imposed by the *Evans* amendment was "divorced from any factual context from which we could discern a relationship to legitimate state interests." *Id.* It remains to be seen in future cases whether personal animosity can justify restrictions on gay citizens in the more narrow circumstance of military service.

<sup>10</sup> *Thomasson*, 80 F.3d at 952 (Hall, J., dissenting).

<sup>11</sup> See Philip Shenon, *Militias Aim to Lure Elite Army Troops, U.S. Generals Fear*, N.Y. TIMES, Mar. 22, 1996, at A1 (explaining that servicemembers may join and receive literature from groups such as "racist skinheads" or the Ku Klux Klan, provided their participation in the groups' activities does not become "active"; after all, "There are First

Instead of identifying the weaknesses of the military's gay ban as applied against men, this Article's focus on sex differences in the policy is intended to highlight the invisibility of women during the congressional debate. Female servicemembers were not seriously considered, even though they will bear the brunt of the policy's enforcement, and even though the justifications offered do not apply to them.<sup>12</sup>

Part II examines the distinctive history of gay women in military service. While that distinctiveness can be difficult to demonstrate in the face of an official policy that purports to exclude all gay servicemembers, it is nonetheless real. The available evidence shows that gay women have served in the military in disproportionate numbers, both in comparison to straight women and, in the modern era of the all-volunteer force, to gay men. In the context of legal equality on the basis of sex, the circumstances are unusual. Often controversy arises because women are barred from meaningful entry into institutions largely controlled by men, but here the policy excluding gay servicemembers works to disproportionately exclude gay women from an institution in which they have played a historical role disproportionate to their numbers. For that reason alone the exclusionary policy deserves special scrutiny.

Part III addresses what I consider the easier question, whether the military could have constitutionally chosen on its own to exclude gay men from the military while allowing gay women to serve. In the military context, equal protection law has not required identical treatment for women and men. Provided the sex-based legal distinction relates to combat duty, women and men would not be similarly situated because women are largely excluded from combat, and those who are not similarly situated need not be treated the same. With respect to the policy excluding gay servicemembers, the congressional debate made clear that the policy's rational basis rested in concerns related to combat. As a result, the military could have made the choice to exempt women

---

Amendment considerations." (quoting Togo D. West, Jr., Secretary of the Army)).

<sup>12</sup> My interpretation of the congressional debate should be taken in the context of my military experience. I served as an aircraft maintenance and munitions maintenance officer with the U.S. Air Force in the late 1970s and early 1980s, at a time when women were just being integrated into less traditional lines of military work. My duty assignments were both in the United States and overseas in the Republic of Turkey, which at the time was designated a "hardship tour" because of limited facilities for servicemembers' families. In the United States, my squadron's duties ranged from the more routine "Cold War" responsibility of preparing for conflict with the Soviet Union to the less routine deployment of aircraft to remote sites under field conditions.

In an earlier article, I discussed the importance of representative accounts of the lives of gay military plaintiffs and criticized reliance on the status/conduct distinction in both litigation and scholarship. See Diane H. Mazur, *The Unknown Soldier: A Critique of "Gays in the Military" Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223, 223-24 (1996).

from its policy excluding gay servicemembers, as they would not generally be serving in combat.

Part IV then focuses on the harder question, whether the military is constitutionally *required* to treat gay men and gay women differently. To ask that women and men be treated differently under the law is to run against a nearly universal assumption that legal distinctions on the basis of sex are constitutionally improper and inevitably harmful to women. A review of general theoretical approaches to equal protection on the basis of sex and the U.S. Supreme Court's more specific approach, however, leaves an opening for a sex-based distinction that could be constitutionally appropriate and ideologically helpful. If, as the congressional debate showed, the military's rational basis for excluding gay servicemembers rested in concerns about male sexuality and male violence in all-male groups, then a policy that excludes women on that basis—and does so disproportionately—should be unconstitutional.

Lastly, Part V evaluates the consequences of *failing* to make a sex-based distinction in the treatment of gay women and gay men under the military's exclusionary policy. The unexamined assumption that men and women should be treated identically has led those opposing the ban to completely disregard the distinctive history of gay women in military service. Rather than questioning whether the military has demonstrated a rational basis for excluding gay women, opponents have, ironically, largely denied their existence.

These critics contend that military women are not generally accused of being gay because they *are* gay, but are most often accused in retaliation for refusing the sexual advances of men. The exclusionary policy is wrong, therefore, not because gay women are disproportionately burdened, but because straight women are unjustly coerced. This strategy to "heterosexualize" all military women, however, inevitably leads to unfortunate efforts to make servicewomen appear stereotypically hyper-feminine and attractive to men, which in turn has trivialized the service of all military women.

## II. THE DISTINCTIVE HISTORY OF GAY WOMEN IN MILITARY SERVICE

Then one day, [General Dwight] Eisenhower got a report. . . that there were lesbians in the WAC [Women's Army Corps] battalion. . . . The General called me in and gave me a direct order. "It's been reported to me that there are lesbians in the WAC battalion. I want you to find them and give me a list. We've got to get rid of them." . . . I said, "Sir, if the General pleases, I'll be happy to check into this and make you a list. But you've got to know, when you get the list back, my name's going to be first."

. . . "You have the highest-ranking WAC battalion assembled anywhere in the world. Most decorated. If you want to get rid of your file clerks, typists,

section commanders, and your most key personnel, then I'll make that list." . . . He just looked at me and said, "Forget that order. Forget about it."<sup>13</sup>

Sergeant Johnnie Phelps had that conversation with General Eisenhower in post-World War II Germany. She estimated that ninety-five percent of the almost nine hundred women in her battalion were gay.<sup>14</sup> Of course, the existence of the exclusionary policy makes the percentage of gay women in the military an inherently unknowable number. Whether one considers Sergeant Phelps' estimate an optimistic exaggeration or not, it seems safe to assume that gay women have always served the military in numbers disproportionate to their representation in the general population. The evidence that is available will never show exactly how disproportionate their service has been, but it suggests that, as compared to straight women, gay women have always carried a greater proportionate share of the burdens and responsibilities<sup>15</sup> of military duty. In the current all-volunteer military, the evidence also suggests that gay women carry a disproportionate burden of national service in comparison to gay men.

A number of different sources of information help complete the picture of the military service of gay women. During World War II, for example, the military struggled with the application of its categorical bar of gay citizens to women. "Officials during the war sometimes seemed to deny that lesbianism even existed in the military, since they were placed in the awkward position of either condoning what had been socially condemned so recently, or disapproving of what really worked to the military's benefit."<sup>16</sup> While the military wanted to limit public visibility of its gay women, it needed to do so in a way that kept them in the service. "[T]he military especially needed women who wanted to do work that was traditionally masculine."<sup>17</sup>

The solution was to temper the "across the board" exclusionary policy with a more informal "under the table" protection of gay women. Officers in the Women's Army Corps (WAC) received training on how to manage gay

---

<sup>13</sup> MARY ANN HUMPHREY, *MY COUNTRY, MY RIGHT TO SERVE: EXPERIENCES OF GAY MEN AND WOMEN IN THE MILITARY, WORLD WAR II TO THE PRESENT* 40 (1990); *see also* LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS* 118 (1991) (recounting the same conversation).

<sup>14</sup> *See* HUMPHREY, *supra* note 13, at 40.

<sup>15</sup> With the burdens and responsibilities of military service come corresponding benefits. *See, e.g.,* *Personnel Adm'r v. Feeney*, 442 U.S. 256, 280-81 (1979) (upholding a civil service personnel system that awarded an absolute preference to military veterans, even though the preference effectively excluded almost all women from professional positions).

<sup>16</sup> FADERMAN, *supra* note 13, at 124.

<sup>17</sup> *Id.* at 123.

servicewomen in their all-female units<sup>18</sup> without resorting to discharge or other punishment. Interestingly, the informal rules were based on the same justification relied on today by the military: the importance of unit cohesion. The only difference was that, during World War II, the presence of gay women in and of itself was not thought to affect unit cohesion. Officers in the WAC were to take punitive action only when homosexuality had some specific detrimental effect:

The lectures suggested that the officers should be sympathetic to close friendships that might crop up between women under wartime conditions. The officers were also alerted that such intimacies may even "eventually take some form of sexual expression," but they were told that they must never play games of hide-and-seek in an attempt to discover lesbianism or indulge in witch-hunting and they must approach the situation with an attitude of generosity and tolerance. They were to take action against lesbianism "only in so far as its manifestations undermine the efficiency of the individual concerned and the stability of the group."<sup>19</sup>

The military continued to draw disproportionate numbers of gay women in the decades after the war. "Military life had particular appeal for working-class women who identified themselves as lesbians in the 1950s. In addition to compatible companionship, it offered them opportunities for career training and travel that females without monetary advantages would have had difficulty finding on their own."<sup>20</sup> In her book *Mixed Company: Women in the Modern Army*,<sup>21</sup> author Helen Rogan described the esprit among servicemembers in women's units as "overwhelmingly gay."<sup>22</sup> The influence of gay senior officers in the WAC was so sweeping that some suggested straight women had difficulty advancing in rank. "There was no way they could be a part of the inner cliques

---

<sup>18</sup> Until the 1970s, the WAC was a separate entity composed only of women that existed within, but apart from, the larger U.S. Army. Enlisted women in the Army were generally commanded only by women officers. Even when women gained permanent military status after World War II, "[t]he [Women's Army] Corps would continue to train, house, administer, promote, and monitor the women's careers." JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* 121 (rev. ed. 1992).

<sup>19</sup> FADERMAN, *supra* note 13, at 123 (citation omitted); *see also* Leisa D. Meyer, *Creating G.I. Jane: The Regulation of Sexuality and Sexual Behavior in the Women's Army Corps During World War II*, 18 *FEMINIST STUD.* 581, 592 (1992) (describing "the contradiction between official proscriptions of homosexuality and the WAC's informal policies on female homosexuality, which were quite lenient").

<sup>20</sup> FADERMAN, *supra* note 13, at 150.

<sup>21</sup> HELEN ROGAN, *MIXED COMPANY: WOMEN IN THE MODERN ARMY* (1981).

<sup>22</sup> *Id.* at 154.

of power [within the WAC]."<sup>23</sup>

Sociological research has confirmed the distinctive role played by gay women in the military, but it has approached the question from a different perspective—the study of civilians. When large groups of both gay and straight female civilians, of all ages, were interviewed, the gay female civilians were significantly more likely to be military veterans.<sup>24</sup> Anecdotal military accounts have also consistently characterized the percentage of gay women in the military over the last fifty years as disproportionately high. Whether World War II-era estimates as high as eighty<sup>25</sup> or ninety percent<sup>26</sup> or more recent estimates of twenty-five to thirty-five percent<sup>27</sup> are correct, it seems reasonable to assume the actual figure is still disproportionate.

Senior male officers in the modern military have recognized that significant numbers of the women they command will inevitably be gay. One male officer discouraged an investigation of homosexuality in his unit because "a lesbian investigation could cost him half the women in his command."<sup>28</sup> Ironically, a Navy Vice Admiral recently relied on the same understanding in explaining to his fleet why gay military women were so difficult to expel: "Experience has

---

<sup>23</sup> *Id.* at 157; see also RANDY SHILTS, *CONDUCT UNBECOMING: LESBIANS AND GAYS IN THE U.S. MILITARY, VIETNAM TO THE PERSIAN GULF* 140 (1993) (gay women "comprised the top echelons of the WACs and WAVEs [Navy women] well into the 1980s").

<sup>24</sup> See Joseph Harry, *Homosexual Men and Women Who Served Their Country*, JOURNAL OF HOMOSEXUALITY, Fall 1984, 117, 117-19.

<sup>25</sup> See SHILTS, *supra* note 23, at 140.

<sup>26</sup> See HUMPHREY, *supra* note 13 at 40; see also FADERMAN, *supra* note 13, at 152 (estimating that 50% of the women in a 1950s Air Force squadron were gay).

<sup>27</sup> See SHILTS, *supra* note 23, at 561; see also *Lesbians, Long Overlooked, Are Central to Debate on Military Ban*, N.Y. TIMES, May 4, 1993, at A23 ("Randy Shilts . . . said in a recent interview that most of the several hundred lesbians he interviewed for his book . . . estimated that 25 percent of the 200,000 or so women in the armed forces are gay."). Two factors, in Shilts's view, have probably contributed to the disproportionate numbers of gay servicewomen. First, military policies of the past have restricted the service of married women and of pregnant women. "This almost guaranteed huge numbers of [servicewomen] whose sexuality leaned toward the nonbreeding side of the street." SHILTS, *supra* note 23, at 140. Second, until relatively recently, non-traditional jobs for women ("men's work") have attracted primarily non-traditional women. The women's movement has gradually broadened the range of women who would consider military duty. See *id.* at 140, 561.

Ironically, one of the best-known gay military plaintiffs, Colonel Margarethe Cammermeyer, was affected both by military policies that tended to increase the numbers of gay women and those that definitely decreased them. Over the course of her career, she has been forced to leave the military twice: once for having a child, and once for being gay. See MARGARETHE CAMMERMEYER & CHRIS FISHER, *SERVING IN SILENCE* 265, 276 (1994).

<sup>28</sup> SHILTS, *supra* note 23, at 533.



also shown that the stereotypical female homosexual in the Navy is hardworking, career-oriented, willing to put in long hours on the job and among the command's top professionals."<sup>29</sup>

The disparity in discharge rates between gay servicewomen and gay servicemen also supports the conclusion that gay women are more likely to serve in an all-volunteer military. Discharge statistics for all the services, covering the years from 1980 to 1990, were compiled by the General Accounting Office for use in the congressional debate. The statistics showed that, on average, women were discharged for homosexuality at a rate two to three times higher than their rate of representation.<sup>30</sup> In the Marine Corps, the disparity was even higher, with women discharged at a rate more than six times higher than their rate of representation.<sup>31</sup> It seems reasonable to assume that women are more likely than men to be discharged for homosexuality because gay women are more likely to serve in the first place.<sup>32</sup>

Lastly, information that sheds light on the number of gay men who serve in the military can be helpful in determining whether the number of gay women who serve is disproportionately high in comparison. Because Human Immunodeficiency Virus (HIV) infection is disproportionately high in gay men, changes in military HIV rates may indirectly suggest corresponding changes in the number of gay men enlisting (and re-enlisting) in the military.<sup>33</sup>

The military instituted its HIV testing program in 1985, testing all personnel upon entry into the military, periodically during their service, and prior to deployment overseas.<sup>34</sup> Since 1985, military HIV rates have steadily declined among both prospective enlistees and active-duty personnel.<sup>35</sup> The number of civilian applicants who tested positive for HIV declined by seventy-five percent between 1985 and 1992.<sup>36</sup> In contrast, the same time period saw a rapid rise in HIV infection in Americans between the ages of eighteen and

---

<sup>29</sup> GAO REPORT, *supra* note 1, at 27.

<sup>30</sup> GAO REPORT, *supra* note 1, at 20; GAO STATISTICS, *supra* note 1, at 46.

<sup>31</sup> GAO STATISTICS, *supra* note 1, at 43.

<sup>32</sup> See *infra* Part V for discussion of the differing viewpoint that women are more often discharged for homosexuality because the exclusionary policy is used as a weapon of sexual harassment.

<sup>33</sup> Randy Shilts identified the HIV epidemic as the one event that made it impossible to deny that gay men did serve in the military, despite the exclusionary policy. "As it had in the civilian world, in the military culture the HIV epidemic fulfilled the twenty-year-old fantasy of gay activists in which all homosexuals [read all male homosexuals] become instantly identifiable, or, in the rhetoric of the 1970s, turned purple." SHILTS, *supra* note 23, at 549.

<sup>34</sup> See RAND REPORT, *supra* note 1, at 248-50.

<sup>35</sup> See *id.* at 245 tbl. 8-2, 249 tbl. 8-5.

<sup>36</sup> See *id.* at 249 tbl. 8-5 (showing that the infection rate of 1.58 per 1,000 applicants in 1985 had declined to 0.44 per 1,000 applicants by 1992).

twenty-five,<sup>37</sup> the prime age range for entry into the military. By 1992, only one in every four thousand Army soldiers on active duty seroconverted, or tested HIV-positive, each year,<sup>38</sup> while researchers estimated that one in every ninety-two American men between the ages of twenty-seven and thirty-nine was infected with HIV in 1993.<sup>39</sup>

It seems likely that self-selection has had a strong effect on military HIV rates, although it is impossible to know how representative gay men seeking to enter the military are of gay men in general.<sup>40</sup> "Those who know or suspect they are HIV-positive have an incentive not to apply, or, if they have not been tested, to seek anonymous or private testing first."<sup>41</sup> To the extent that gay men are disproportionately at risk for HIV infection, they should also disproportionately make the self-selective choice not to enter (or to leave) a military environment where they will be continually tested and subject to discharge. Similarly, to the extent that gay men are disproportionately at risk, declining HIV rates in the military indirectly suggest declining military service among gay men.

These various sources of information—military policies, anecdotal accounts from both junior enlisted personnel and senior officers, sociological research, disparities in discharge rates, and HIV infection trends—are extremely diverse in origin, yet they are consistent in what they suggest. Gay women have taken on the responsibility of military service to a disproportionate degree, in comparison to both straight women and, in the all-volunteer force, to gay men. The conclusion is significant in terms of the constitutional scrutiny that the current "Don't Ask, Don't Tell" exclusionary policy should receive. If gay women, in comparison to gay men, have played a distinctive role in military service, any policy that disproportionately affects women should be subject to special scrutiny, particularly if the justifications offered for the policy apply only to men.<sup>42</sup>

---

<sup>37</sup> See *Study Puts the Risk of H.I.V. in Young U.S. Men at 1 in 92*, N.Y. TIMES, Nov. 24, 1995, at B19 [hereinafter *HIV Risk*] (citing Philip S. Rosenberg, *Scope of the AIDS Epidemic in the United States*, 270 SCIENCE 1372 (1995)).

<sup>38</sup> See RAND REPORT, *supra* note 1, at 246 tbl. 8-3.

<sup>39</sup> See *HIV Risk*, *supra* note 37.

<sup>40</sup> See RAND REPORT, *supra* note 1, at 256. For example, gay men seeking to enter the military may be more motivated to avoid high-risk sexual behavior. Not only would they be subject to periodic HIV testing, but military law would permit criminal prosecution of that high-risk sexual behavior. See 10 U.S.C. § 925 (1994) (criminalizing commission of sodomy by military personnel).

<sup>41</sup> RAND REPORT, *supra* note 1, at 248-49.

<sup>42</sup> See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) ("In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."); see also

### III. COULD THE MILITARY CHOOSE TO TREAT GAY MEN AND GAY WOMEN DIFFERENTLY?

"The basic principle of equal protection law is that similarly situated persons must be treated similarly. The corollary to this proposition is that differently situated persons may be treated differently."<sup>43</sup> While the scope of circumstances in which women are considered differently situated from men has diminished over the last twenty-five years, the military environment remains one of the few places where equal protection law still finds women to be "different." The relevant way in which military women are legally different from men is that female servicemembers are still barred from almost all combat positions.<sup>44</sup>

#### A. *Being All That You Can Be: What It Means to Be "Similarly Situated" in the Military*<sup>45</sup>

Three U.S. Supreme Court decisions illustrate the "similarly situated" analysis in a military context. All three are challenges to rules explicitly treating men and women differently, yet two find the different treatment constitutional and one does not. The answer seems to depend not so much on the strength of the justification for treating women less favorably or more favorably (and it is

---

*Frontiero v. Richardson*, 411 U.S. 677, 689 n.22 (1973) (plurality opinion) (noting that the sex-based distinction at issue was "not in any sense designed to rectify the effects of past discrimination against women").

<sup>43</sup> David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. J. 33, 35 n.5 (1984).

<sup>44</sup> General histories of combat restrictions on women can be found in D'Ann Campbell, *Combatting the Gender Gulf*, 2 TEMP. POL. & CIV. RTS. L. REV. 63, 64-68, 86-89 (1992); Lucy V. Katz, *Free a Man to Fight: The Exclusion of Women From Combat Positions in the Armed Forces*, 10 LAW & INEQ. J. 1, 5-10, 13-15 (1991); Lucinda J. Peach, *Women at War: The Ethics of Women in Combat*, 15 HAMLINE J. PUB. L. & POL'Y 199, 201-07 (1994). More recently, as a result of the performance of female servicemembers during the Persian Gulf War, relatively small numbers of combat positions in aircraft and on surface warships have been opened to women. Still, however, women are barred from direct ground combat and are therefore ineligible for most combat duty. See Larry Rohter, *Era of Female Combat Pilots Opens with Shrugs and Glee*, N.Y. TIMES, Apr. 29, 1993, at A1 (opening Air Force and Navy positions in aerial and naval combat to women); Eric Schmitt, *Army Will Allow Women in 32,000 Combat Posts*, N.Y. TIMES, July 28, 1994, at A12 (continuing to bar Army and Marine Corps women from armor, infantry, and field artillery units).

<sup>45</sup> The United States Army has used the slogan "Be all that you can be" in its recruiting advertisements since 1980. See Kevin Goldman, *Army Launches New TV Ad Campaign*, WALL ST. J., Mar. 7, 1995, at B9.

often both), but on whether the Court believed men and women ever stood in the same shoes.

Of all the ways the military chooses to treat men and women differently, *Rostker v. Goldberg*<sup>46</sup> examined the one most familiar to civilians—the draft registration system. In the wake of the Soviet invasion of Afghanistan, President Carter sought to reactivate the draft registration system. His preference was to require both young men and women to register, but Congress authorized a system that registered only men.<sup>47</sup>

A class of men subject to draft or to registration for the draft challenged the explicitly sex-based distinction in the system, alleging that they had been denied equal protection of the law.<sup>48</sup> From the point of view of the male plaintiffs, the distinction impermissibly favored women; men were being asked to carry the burden of national service alone.<sup>49</sup> Their claim failed. The Court concluded that men and women need not be treated the same when they are not similarly situated. “Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft.”<sup>50</sup> To treat women the same in an arena where they were clearly different would be a “gesture[ ] of superficial equality.”<sup>51</sup>

Of course, the Court dodged the fact that the only reason women were differently situated with respect to the draft was that other laws, equally sex-based, excluded them from combat.<sup>52</sup> Furthermore, once women were deemed

---

<sup>46</sup> 453 U.S. 57 (1981).

<sup>47</sup> See *id.* at 60–61.

<sup>48</sup> See *id.* at 61–62.

<sup>49</sup> The plaintiffs could potentially have been women. A draft system that excuses women from what is likely the most burdensome responsibility of citizenship leaves women as something less than full citizens. See generally Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 524–29 (1991) (explaining that the exclusionary draft system promotes a public policy forum in which “women’s voices go largely unheard”). Concrete, immediate harms, however, more starkly illustrate the different effects that explicitly sex-based distinctions have on men and women. The more diffuse harms that arise from laws that “protect” women from the harshness of full participation in society have been less compelling to the Court, and for this reason most plaintiffs in equal protection suits have been men. See Cole, *supra* note 43, at 37.

<sup>50</sup> *Rostker v. Goldberg*, 453 U.S. at 78.

<sup>51</sup> *Id.* at 79.

<sup>52</sup> Professor Ann Freedman has noted that if legislatures can justify sex-based distinctions on the basis of other sex-based laws that are already in effect, “the equal protection clause can easily be circumvented.” Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 939 (1983).

The *Rostker v. Goldberg* plaintiffs did not challenge the constitutionality of the underlying combat restriction. See *Rostker v. Goldberg*, 453 U.S. at 87 (Marshall, J.,

"different" by combat ineligibility, the Court gave little scrutiny to the factual assumption that the military had no need to draft non-combat personnel.<sup>53</sup> Yet, if the Court's decision is taken at face value, it permits the military to treat male and female servicemembers differently provided the difference has some connection to combat duty.

*Schlesinger v. Ballard*<sup>54</sup> applied the same principle to men and women already serving in the military. A male officer challenged a Navy provision that allowed female officers to serve for a longer period of time before they were subject to mandatory dismissal for failure to advance in rank.<sup>55</sup> As in *Rostker v. Goldberg*, *Schlesinger v. Ballard* pointed to women's exemption from combat duty as the justification for women's "preferential"<sup>56</sup> treatment. Women needed more time to advance because they had fewer options in obtaining prime sea-duty assignments useful for promotion, also known as "getting one's ticket punched":

[T]he different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service. Appellee has not challenged the current restrictions on women officers' participation in combat and in most sea duty.<sup>57</sup>

---

dissenting). Interestingly, the lead plaintiff in the suit, Robert Goldberg, was not even subject to the draft as a combat soldier. The only reason he could be drafted was because he was a medical doctor. See Linda K. Kerber, "A Constitutional Right to be Treated Like . . . Ladies": Women, Civic Obligation and Military Service, 1993 U. CHI. L. SCH. ROUNDTABLE 95, 102. The Court's reasoning, based on the military's need for combat soldiers, would not seem to apply to the military's need for medical doctors.

<sup>53</sup> See *Rostker v. Goldberg*, 453 U.S. at 97 (Marshall, J., dissenting) ("[T]he majority simply assumes that registration prepares for a draft in which *every* draftee must be available for assignment to combat."). Professor Wendy Williams has criticized the "similarly situated" analysis, observing that it does not "require that the perceived differences between the sexes bear a close connection to the purposes of the legislation. . . . It is enough that differences be identified and that the goal be a worthy one." Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 182 n.50 (1982).

<sup>54</sup> 419 U.S. 498 (1975).

<sup>55</sup> See *id.* at 499-500.

<sup>56</sup> Again, whether the *Schlesinger v. Ballard* promotion regulation favors or disfavors women is open to debate. To the male plaintiff facing involuntary discharge, the regulation seems an unfair burden. At the same time, a promotion system that seems to make advancement "easier" for women can stigmatize their achievements.

<sup>57</sup> *Schlesinger v. Ballard*, 419 U.S. at 508.

If the justification for a sex-based distinction can be linked in some manner to men's participation in combat, women by definition will be found not similarly situated. That dissimilarity, under *Rostker v. Goldberg* and *Schlesinger v. Ballard*, gives the military wide discretion to treat men and women differently, essentially as it sees fit. *Schlesinger v. Ballard* upheld different promotion guidelines for male and female officers even though legislative history showed that the unequal tenure periods may have been accidental rather than purposeful.<sup>58</sup>

Not all distinctions between men and women in the military, however, can be justified on the basis of participation in combat. *Frontiero v. Richardson*<sup>59</sup> examined a military policy that paid increased benefits to married male servicemembers across the board, but paid those same spousal benefits to married female servicemembers only if their husbands were actually dependent on their wives' military income. Sharron Frontiero, an Air Force officer, was denied spousal benefits because her husband, a full-time student, received government assistance for school.<sup>60</sup> She contended that the distinction denied her equal protection of the law, as a male officer in her position would have been given the extra payment no matter what his wife's income.<sup>61</sup>

This was (and should have been) an easy case for the Court.<sup>62</sup> The issue is nothing more than "equal pay for equal work." Under the policy, men with wives of independent means are paid more than women with husbands of independent means, for no reason other than the assumption that men more often earn the most income. In the absence of any sex-based link to combat duty, the court considered women similarly situated and entitled to equal treatment.<sup>63</sup>

The significant factor running through the military cases, then, is whether the sex-based distinction has any connection to men's responsibility for, or women's exemption from, participation in combat. Is the policy excluding gay servicemembers justified on the basis of combat duty requirements? If it is, then the military would have the discretion to treat men and women differently under the policy and, for example, could decide to retain gay women in the service

---

<sup>58</sup> *Id.* at 512-17 (Brennan, J., dissenting).

<sup>59</sup> 411 U.S. 677 (1973) (plurality opinion).

<sup>60</sup> *See id.* at 680.

<sup>61</sup> *See id.* at 678-79.

<sup>62</sup> The only difficulty the Court experienced was in determining which level of scrutiny should apply in invalidating the statute. Justice Brennan's plurality opinion applied the same strict scrutiny applicable to racial classifications; Justice Powell's concurrence found strict scrutiny unnecessary, particularly with the Equal Rights Amendment still pending adoption. *See id.* at 691-92 (Powell, J., concurring).

<sup>63</sup> *See id.* at 690.

while discharging gay men.

### B. *The 1993 Congressional Debate: Concerns About Combat*

If there is a rational basis for the exclusionary policy, it would be found in the voluminous hearings and reports undertaken by Congress before it codified the “Don’t Ask, Don’t Tell” policy. The Senate held its hearings first, and the centerpiece of the military’s policy justifications was presented at a session entitled “The Role of Unit Cohesion in Developing Combat Effectiveness.”<sup>64</sup> Two expert witnesses testified in favor of barring gay servicemembers. Dr. Darryl Henderson, a former combat officer in Vietnam who went on to become a military researcher, discussed “the importance of morale, discipline, and cohesion in combat effectiveness.”<sup>65</sup> Dr. David Marlowe, a department chief in military psychiatry, testified on the subject of “stress, adaptation, cohesion, and psychological readiness for combat.”<sup>66</sup>

Their testimony was devoted entirely to the issue of bonding and cohesiveness among men in all-male combat units, a necessary component of combat effectiveness that, in their view, would be destroyed by the presence of gay men. There was no indication that either witness had ever served with, or studied, a single female servicemember during their military or research careers. The definition of “unit cohesion” itself, the cornerstone of the military gay ban, was set out in terms of ground combat, an activity from which women are always excluded:

In its simplest form cohesion could be viewed as that set of factors and processes that bonded soldiers together and bonded them to their leaders so they would stand in the line of battle, mutually support each other, withstand the shock, terror and trauma of combat, sustain each other in the completion of their mission and neither break nor run.<sup>67</sup>

Dr. Henderson identified the critical question in the debate over gay servicemembers as “What causes soldiers to repeatedly expose themselves to the most lethal environment known, instead of taking cover or leaving the area as quickly as possible?”<sup>68</sup> He answered his own question in explaining why the presence of gay men would destroy the bonds that encourage men to risk their lives for one another. “The soldier’s loyalty to the small group and the group’s

---

<sup>64</sup> *Senate Hearings*, *supra* note 1, at 245–343.

<sup>65</sup> *Id.* at 246 (quoted in Senator Sam Nunn’s opening statement).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 266.

<sup>68</sup> *Id.* at 248.

expectation that he will advance under fire is the only reliable force on the battlefield capable of causing the soldier to expose himself repeatedly to the dangers of war."<sup>69</sup> Dr. Marlowe's testimony was based on studies of American combat soldiers in every conflict from World War II through the Persian Gulf War,<sup>70</sup> focusing on how unit cohesiveness will "enable the soldier to deal with the untoward stresses of combat."<sup>71</sup>

Whether the task at hand is to restrict the military service of women<sup>72</sup> or of gay people, defenders of the status quo have always relied on the worst-case scenario of hand-to-hand combat to justify exclusions that are in fact much more extensive. In the words of one skeptical military officer and professor, "exclusionists write as if wars were still waged primarily with axes."<sup>73</sup> The military's use of the same worst-case images against gay servicemembers that were once (and are still) used against women, however, only makes it clearer that the military's justifications for the gay ban apply only to gay men. Neither gay women nor straight women will find themselves in the close-combat circumstances that purportedly require unit cohesion—the cohesion that General Schwarzkopf believes only straight men can provide:

---

<sup>69</sup> *Id.* at 249.

<sup>70</sup> *See id.* at 265–76.

<sup>71</sup> *Id.* at 265.

<sup>72</sup> *See, e.g.*, ROBERT TIMBERG, *THE NIGHTINGALE'S SONG* 260–61 (1995) (describing graphic images of hand-to-hand combat that were used to criticize admission of women to the U.S. Naval Academy).

<sup>73</sup> Paul E. Roush, *The Exclusionists and Their Message*, 39 NAVAL L. REV. 163, 165 (1990). "Exclusionists" are often tempted to mischaracterize military duties in a way that makes them seem inappropriate for whatever group the military would like to exclude. Senator John Warner of Virginia was a member of the Senate Armed Services committee during both the Carter-era debate over registering women for the draft and the more recent hearings concerning gay servicemembers. In *Rostker v. Goldberg*, the U.S. Supreme Court expressly relied on Senator Warner's reminiscences about General Patton and the Battle of the Bulge in deciding to excuse women from draft registration. According to Senator Warner and the witness he was questioning, only combat-eligible men could be drafted because non-combat support personnel might be brought to the front lines and added to a tank crew on a moment's notice, as General Patton once ordered. *See Rostker v. Goldberg*, 453 U.S. 57, 82 n.17 (1981). In the modern armed forces, it is silly to suggest that untrained support personnel, male or female, are ever going to be asked to perform such technologically complex duty in an emergency.

Senator Warner held true to form in the congressional hearings on the exclusion of gay servicemembers. He informed his colleagues that the stress and tension of sea duty during war could be so great that a sleeping sailor might lose control and unintentionally assault a bunkmate who was innocently returning to his sleeping quarters. *Senate Hearings, supra* note 1, at 306. Left unstated was the suggestion of how much worse it could be if it was a gay bunkmate.



What keeps soldiers in their foxholes rather than running away in the face of mass waves of attacking enemy, what keeps the marines attacking up the hills under withering machinegun fire, what keeps the pilots flying through heavy surface-to-air missile fire to deliver the bombs on targets, is the simple fact that they do not want to let down their buddies on the left or the right. . . .

[T]he introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war.<sup>74</sup>

Having already excluded women from the responsibilities of combat duty, the military could have chosen to treat them in a consistent fashion by also exempting them from the combat-based restrictions that apply to gay servicemembers.

Another issue raised in the congressional debate was the possibility of increased risk of HIV infection introduced by the recruitment and retention of gay servicemembers. This issue, too, was a combat-related concern. Military witnesses raised fears that the spattering of blood in combat would discourage soldiers from coming to the aid of the wounded; they also feared the spread of infection through battlefield transfusions.<sup>75</sup>

Not only are the military's HIV concerns tied to combat risks, but they are also tied to gay men, not gay women. The incidence of HIV in gay men is disproportionately high,<sup>76</sup> while the additional risk of HIV introduced into the military by gay women is as close to zero as medical science can determine.<sup>77</sup> Some witnesses seemed to notice the distinction, but only in a joking manner. The author of a Congressional Research Service report observed as an aside that "if the interest is protecting the health of the force, one pundit possibly suggested recruiting more lesbians."<sup>78</sup> Senator John Kerry of Massachusetts noted that the only way to keep HIV out of the military would be to "go to an all-lesbian army."<sup>79</sup> Still, it was difficult for some to remember that not all gay

---

<sup>74</sup> *Senate Hearings*, *supra* note 1, at 595-96.

<sup>75</sup> *See, e.g., Senate Hearings*, *supra* note 1, at 529 (testimony of Fleet Master Chief Ronald Carter); *Senate Defense Authorization Hearings*, *supra* note 1, at 537-38 (statement of the Surgeon General of the Army); *House Armed Services Hearings*, *supra* note 1, at 89-91, 168 (testimony of retired Colonel John Ripley, described by Representative Bateman of Virginia as "the most decorated living Marine"), 102-03 (statement of retired General William Weise), 309-10 (statement of the Surgeon General of the Army).

<sup>76</sup> *See RAND REPORT*, *supra* note 1, at 245 tbl. 8-1, 256.

<sup>77</sup> *See ELINOR BURKETT, THE GRAVEST SHOW ON EARTH: AMERICA IN THE AGE OF AIDS* 211-14 (1995).

<sup>78</sup> *Senate Hearings*, *supra* note 1, at 218.

<sup>79</sup> *Id.* at 489; *see also RAND REPORT*, *supra* note 1, at 256 ("[A]ny increase in the

servicemembers are men. The Surgeon General of the Army, who should be able to be more precise, referred to homosexuality as a "propensity for male-to-male sex."<sup>80</sup>

Because the military has justified the exclusion of gay servicemembers based on the need for cohesiveness in combat units and the prevention of HIV transmission between combat soldiers, it would have the same discretion to apply that policy differently to men and women that it exercised in *Rostker v. Goldberg* and *Schlesinger v. Ballard*. The language of *Rostker v. Goldberg* is instructive: "Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft."<sup>81</sup> Paraphrased in the context of the gay ban, the same principle would allow the service of gay women even if gay men were barred: "Men and women, because of the combat restrictions on women, are simply not similarly situated with respect to the reasons gay servicemembers are excluded." Again paraphrasing from *Rostker v. Goldberg*, "[t]he exemption of women from [the gay ban] is not only sufficiently but also closely related to Congress' purpose in [barring gay servicemembers]."<sup>82</sup>

As the exclusionary policy is now written, it provides strictly equal treatment for gay women and gay men, at least on the face of the policy. It provides this equal treatment, though, to women and men who are not similarly situated with respect to the reasoning used to justify the policy. Under the Supreme Court's interpretation of equal protection in combat-related environments, the military has a choice. One choice would be to treat women just the same as men. The military could choose to register or draft women it may not need; it could hold men and women to the same promotion schedules, even though women might be disadvantaged by a lack of combat experience. On the other hand, the military can make the choices it made in *Rostker v. Goldberg* and *Schlesinger v. Ballard*. As long as women are exempted from combat responsibility, the military can make distinctions related to that exemption from duty. Allowing gay women, but not gay men, to serve would be a similarly permissible distinction.

---

proportion of homosexual women would be expected to reduce, rather than increase, the incidence of HIV infection in the military.").

<sup>80</sup> *Senate Defense Authorization Hearings*, *supra* note 1, at 537; *see also House Armed Services Hearings*, *supra* note 1, at 309.

<sup>81</sup> *Rostker v. Goldberg*, 453 U.S. 57, 78 (1981).

<sup>82</sup> *See id.* at 79.

#### IV. IS THE MILITARY CONSTITUTIONALLY REQUIRED TO TREAT GAY MEN AND GAY WOMEN DIFFERENTLY?

Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike. . . .<sup>83</sup>

Here is the hard question. While the military has the discretion to choose to treat women differently from men when the distinction is based on eligibility for combat, it raises the stakes considerably to suggest that women *must* be treated differently. This issue goes right to the heart of the scholarly debate over the direction of equal protection on the basis of sex: are there *ever* circumstances in which women and men should be treated differently under the law? Even if those circumstances exist, do they lead down a path too risky to pursue? This Article contends that, in the distinctive context of gay women in the military, the law of equal protection may require that they be treated differently from gay men. That same distinctive context also makes it unlikely that different treatment when it is appropriate, as it is here, will lead to different treatment under circumstances when it is not.

##### A. *General Approaches to Equal Protection on the Basis of Sex*

Feminist scholars have identified three basic schools of thought with respect to equal protection on the basis of sex. Professor Christine Littleton describes the "symmetrical" approach as an "attempt to equate legal treatment of sex with that of race and deny that there are in fact any significant natural differences between women and men; in other words, to consider the two sexes symmetrically located with regard to *any* issue, norm, or rule."<sup>84</sup> To the extent women and men may seem different, these differences are only perceived, not real; even if real, differences imposed by stereotypical sex-role restrictions could be eliminated.<sup>85</sup>

In contrast, Professor Littleton describes the "asymmetrical" approach as one that "rejects the notion that all gender differences are likely to disappear, or even that they should."<sup>86</sup> At least with respect to characteristics rooted in

---

<sup>83</sup> *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) (comparing, under the Equal Protection Clause, different avenues of access to state ballots for established political parties and for independent political candidates).

<sup>84</sup> Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1291 (1987) (emphasis in original).

<sup>85</sup> *See id.*

<sup>86</sup> *Id.* at 1292.

biology, men and women should be treated differently when necessary.<sup>87</sup> The problem, of course, is that the same model that permits preferential treatment for women based on biological difference could also validate laws that perpetuate women's traditional role as something less than a full participant in society. As Professor Wendy Williams said, "If we can't have it both ways, we need to think carefully about which way we want to have it."<sup>88</sup>

The third approach arises out of the difficulty encountered in distinguishing between the first two. When is a difference between women and men merely stereotypical and not "real"? If the difference arises only from historical stereotypes about women's place in the world, then women and men are similarly situated and must be treated the same. But if the difference is in some sense biological and "real," then what kind of different treatment is appropriate? After all, those not similarly situated need not be treated the same.

The "inequalities" or "subordination" approach, associated most strongly with Professor Catharine MacKinnon,<sup>89</sup> dismisses the importance of determining whether differences between women and men are socially imposed or "real," or whether women and men are similarly situated with respect to some legal classification. Whatever the cause of the difference or however "rational" the classification, the key factor in the inequalities approach is whether the legal classification "cumulatively disadvantages women for their differences from men."<sup>90</sup> It "explicitly inquires whether a particular classification tends to facilitate and reinforce the subordination of women to men."<sup>91</sup>

---

<sup>87</sup> See *id.* at 1295-96.

<sup>88</sup> Williams, *supra* note 53, at 196 (warning that protective legislation for women is "a double-edged sword"). "[S]ex-based stereotypes can be readily manipulated, depending on the viewpoint of those who use them." *Id.* at 189 n.75.

<sup>89</sup> See generally CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 101-41 (1979) [hereinafter MACKINNON, *SEXUAL HARASSMENT*]; CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32-45 (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*].

<sup>90</sup> MACKINNON, *SEXUAL HARASSMENT*, *supra* note 89, at 116.

<sup>91</sup> Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *TEX. L. REV.* 387, 397 (1984). Professors Sylvia Law and Christine Littleton have made proposals that are analogous to the inequalities approach. Professor Law suggests that "laws governing reproductive biology should be scrutinized by courts to ensure that (1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state purpose." Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955, 1008-09 (1984). Professor Littleton's "acceptance" model "does not view sex differences as problematic per se, but rather focuses on the ways in

More importantly for the treatment of gay women in the military, Professor MacKinnon criticizes unthinking reliance on strict legal equality as the solution to discrimination on the basis of sex. A classification that fails to make a distinction between women and men may harm women in the same way as a classification that expressly makes women different. "Indeed, the best way to preserve a concretely unequal status quo may be by the rigorous application of a neutral standard."<sup>92</sup> In Professor MacKinnon's view, there is a problem with a system in which "changing an unequal status quo is discrimination, but allowing it to exist is not."<sup>93</sup>

Departing from the status quo—strict legal equality—is controversial. In addition to the concern that a system that allows distinctions benefiting women will also allow distinctions burdening women, some commentators believe that different treatment of women and men under the law would be divisive. Is it counterproductive to assert that gay women should still be able to serve in the military when gay men are not?<sup>94</sup> Would it draw attention away from the larger problem, the legal restrictions imposed on gay citizens, and focus it on the fairness or unfairness of making distinctions on the basis of sex?<sup>95</sup> Would it divide gay women from gay men, or divide straight and gay women in the military from one another?<sup>96</sup>

Professor Frances Olsen proposes that distinctions on the basis of sex "might or might not divide people and divert attention, depending on the historical and political context within which the legislation is enacted and enforced."<sup>97</sup> With gay women in the military, that distinctive historical context

---

which differences are permitted to justify inequality. It asserts that eliminating the unequal consequences of sex differences is more important than debating whether such differences are 'real,' or even trying to eliminate them altogether." Littleton, *supra* note 84, at 1296.

<sup>92</sup> MACKINNON, *SEXUAL HARASSMENT*, *supra* note 89, at 127.

<sup>93</sup> MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 89, at 42.

<sup>94</sup> See, e.g., Williams, *supra* note 53, at 196 (discussing whether pregnancy should be treated as a special case and asking, "On what basis can we fairly assert . . . that the pregnant woman fired by [her employer] deserved to keep her job when any other worker who got sick for any other reason did not?").

<sup>95</sup> See, e.g., *id.* ("Creating special privileges [for pregnant women] has, as one consequence, the effect of shifting attention away from the employer's inadequate sick leave policy or the state's failure to provide important protections to all workers and focusing it upon the unfairness of protecting one class of worker and not others."); see also Law, *supra* note 91, at 1032 (agreeing that distinctions on the basis of sex can be divisive); Olsen, *supra* note 91, at 399–400 ("There is no simple way to determine *a priori* whether a partial reform that protects one class will advance or retard the general reform effort.").

<sup>96</sup> See Olsen, *supra* note 91, at 399 ("[A]ny form of special protection can divide women—from one another, as well as from men.").

<sup>97</sup> *Id.*

exists.<sup>98</sup> A favorable political context might also be present. The recruitment and retention of gay women could provide a precedent for national service by gay citizens under much less threatening circumstances, given that Congress's concerns lay entirely with the service of gay men.<sup>99</sup>

*B. The U.S. Supreme Court's Approach to Equal Protection: Distinctions that Perpetuate Historical Patterns of Discrimination Against Women*

Not all sex-based legal distinctions are treated equally. The Supreme Court has focused on a particular type of sex-based distinction as problematic for equal protection: "stereotypical presumptions that reflect and reinforce patterns of historical discrimination."<sup>100</sup> Notice that the playing field is not perfectly level. The Court singles out not all generalizations about the sexes, but only those that cause particular harm by perpetuating the effects of discriminatory treatment.

[T]his Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of archaic and overbroad generalizations about gender or based on outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.<sup>101</sup>

*Craig v. Boren*<sup>102</sup> established the heightened standard for review of sex-based distinctions, requiring that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."<sup>103</sup> In striking a state law that allowed young adult women, but not their male peers, to purchase "near beer," the Court rejected Oklahoma's justification that young men were more likely to drink and drive. "[I]ncreasingly outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas were rejected as loose-fitting characterizations incapable of supporting state statutory schemes

---

<sup>98</sup> See *supra* Part II.

<sup>99</sup> See Law, *supra* note 91, at 1032 ("[T]he political reality is that it is often easier to persuade a legislature to help or protect a particular group that is smaller than all who might need the help or protection.").

<sup>100</sup> J.E.B. v. Alabama, 511 U.S. 127, 141-42 (1994).

<sup>101</sup> *Id.* at 1424-25 (citations and internal quotations omitted).

<sup>102</sup> 429 U.S. 190 (1976).

<sup>103</sup> *Id.* at 197.

that were premised upon their accuracy.”<sup>104</sup>

The military cases follow the same reasoning.<sup>105</sup> The Court identified the sex-based pay and benefits policy in *Frontiero v. Richardson*<sup>106</sup> as unconstitutional because it was based on “an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”<sup>107</sup> At the same time the policy rested on an assumption that a women’s earnings usually were not needed to support her family, it made it that much more difficult for an individual woman to actually support her family. “[S]tatutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.”<sup>108</sup> Unlike distinctions based on women’s ineligibility for combat service, *Frontiero v. Richardson* was impermissibly based on “overbroad generalizations” about women.<sup>109</sup>

It is not that men have no protection against sex-based distinctions that violate equal protection principles; most plaintiffs in constitutional sex discrimination cases have been men.<sup>110</sup> In fact, it is the protective nature of “outdated generalizations” about women that often results in more obvious and specific harms to men. If a legal classification excuses women from responsibility or grants added benefits to them, it inevitably results in some additional practical burdens on men.

---

<sup>104</sup> *Id.* at 199 (internal quotations omitted).

<sup>105</sup> Interestingly, the plaintiffs in *Craig v. Boren* relied to some extent on “military justifications” in seeking to have the sex-based law invalidated. They argued that if young women were permitted to buy alcohol, but young men were not, then a soldier might have to endure the “insult” of having his “combat-disqualified girlfriend” buy beer for him. *See Cole, supra* note 43, at 80–81 (emphasis apparently in the original). The plaintiff’s brief added:

One can well imagine, under the present law, the spectacle outside the PX package store at Fort Sill, Oklahoma, of a 20-year-old First Lieutenant of artillery—maybe even a battery commander, with all the power and responsibility that that entails—idling his jeep while his 18-year-old WAC clerk-typist PFC runs in to purchase her CO’s six-pack for him!

*Id.* at 81.

<sup>106</sup> 411 U.S. 677 (1973).

<sup>107</sup> *Id.* at 684.

<sup>108</sup> *Id.* at 686–87.

<sup>109</sup> *See Rostker v. Goldberg*, 453 U.S. 57, 67 (1981); *Schlesinger v. Ballard*, 419 U.S. 498, 507 (1975).

<sup>110</sup> *See supra* note 49. While Chief Justice Rehnquist has argued that heightened scrutiny should not apply to discrimination against men, that contention has not prevailed. *See Craig v. Boren*, 429 U.S. 190, 219–20 (1976) (Rehnquist, J., dissenting).

Looking at the larger picture, though, commentators argue that “all discriminations between the sexes ultimately redound to the detriment of females, because they tend to reinforce ‘old notions’ restricting the roles and opportunities of women.”<sup>111</sup> The Court’s focus is similarly one-sided, singling out for special scrutiny those sex-based distinctions that reinforce historical discrimination against women. There is no inconsistency between the Court’s particular attention to historical discrimination against women—which men have not experienced<sup>112</sup>—and its intention to apply the same standard to male and female plaintiffs.<sup>113</sup> Burdens on both men and women will be analyzed by the same standard provided that the burden perpetuates historical stereotypes about the place of women in society.<sup>114</sup>

The Court’s focus on reversing dysfunctional patterns of history is critical to understanding how it would treat the issue of gay women in the military. Its first task, however, would be to determine whether gay women and gay men are differently situated at all, because similarly situated women and men would be entitled to equal treatment. As Part III explained, the military has been given discretion to make distinctions between the sexes based on combat eligibility, which it could have, but did not, exercise in drafting its policy excluding gay servicemembers. In addition to combat eligibility, the Supreme Court has carved out another area of “real” difference between men and women, not

---

<sup>111</sup> *Craig v. Boren*, 429 U.S. at 220 n.2 (Rehnquist, J., dissenting); see also *Cole*, *supra* note 43, at 38 (“all stereotypic distinctions ultimately harm women”) (emphasis in original). In arguing the plaintiff’s case in *Craig v. Boren*, now-Justice Ruth Bader Ginsburg contended that the sex-based distinction contributed to “the notion of men as society’s active members, women as men’s quiescent companions.” *Id.* at 81.

It is unclear to me how the sex-based distinction in *Craig v. Boren* contributed to outdated assumptions about the role of women. If anything, it contributed to the notion of young men as society’s *irresponsible* members, and young women as their more responsible counterparts. See *Craig v. Boren*, 429 U.S. at 213 n.5 (Stevens, J., concurring) (“I would not be surprised if it represented nothing more than the perpetuation of a stereotyped attitude about the relative maturity of the members of the two sexes in this age bracket.”).

<sup>112</sup> See *Michael M. v. Superior Court*, 450 U.S. 464, 476 (1981) (plurality opinion) (“But we find nothing to suggest that men, because of past discrimination or peculiar disadvantages, are in need of the special solicitude of the courts.”); *Craig v. Boren*, 429 U.S. at 212 n.1 (men have not experienced “historic, pervasive discrimination”).

<sup>113</sup> See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (“That this statutory policy discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.”).

<sup>114</sup> See *J.E.B. v. Alabama*, 511 U.S. 127, 141–42 (1994) (explaining that in the context of jury selection, both men and women “have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination”).



explainable by mere stereotype, assumption, or generalization. Differences in sexuality or sexual behavior between men and women can also constitutionally justify different treatment under the law.

*C. Exceptions to Strict Equality: Distinctions Based on Male Sexual Behavior*

Professor Williams calls these cases, along with the military decisions, “the hard cases.”<sup>115</sup> They are hard because they present differences between men and women which at some level are rooted in unavoidable biology—the “real” differences—but are also shaped and exaggerated by social forces.<sup>116</sup> The combination of biological and social determinants can create a more significant difference in how men and women live<sup>117</sup> than would be warranted by biology alone. The Supreme Court’s reliance on “real” sex differences in apportioning equal protection has been criticized for this very reason; it can fail to separate nature and nurture in evaluating apparent differences between women and men.<sup>118</sup>

One of the best examples of a “hard case” is *Dothard v. Rawlinson*,<sup>119</sup> a suit brought by a female prison guard applicant. The female applicant challenged a state law barring employment of women as guards in high-security prisons that housed men.<sup>120</sup> The Supreme Court upheld the restriction,<sup>121</sup> finding more than just the “romantic paternalism”<sup>122</sup> of *Frontiero v.*

---

<sup>115</sup> Williams, *supra* note 53, at 180.

<sup>116</sup> Professor Ann Freedman categorizes these cases as “quasi-definitional” because they fall half-way between “average” differences that overlap between men and women, such as height, weight, intellectual ability, or aggression, and “definitional” differences that do not overlap at all, with pregnancy being the prime example. See Freedman, *supra* note 52, at 922–24. Quasi-definitional differences, such as eligibility for combat and responsibility for child care, have a “close historical and cultural connection to definitional differences.” *Id.* at 924.

<sup>117</sup> See Littleton, *supra* note 84, at 1297 (asserting that the goal of equality should be “symmetry in the lived-out experience of all members of the community”).

<sup>118</sup> See Freedman, *supra* note 52, at 944–45.

<sup>119</sup> 433 U.S. 321 (1977).

<sup>120</sup> See *id.* at 326 n.6.

<sup>121</sup> Although the plaintiff brought claims under both Title VII and the Fourteenth Amendment, the case was decided under Title VII alone. The decision, however, remains equally applicable to the constitutional question. “In the case of a state employer, the bfoq [bona fide occupational qualification] exception would have to be interpreted at the very least so as to conform to the Equal Protection Clause of the Fourteenth Amendment.” *Id.* at 334 n.20.

<sup>122</sup> *Id.* at 335.

*Richardson*. Inside the prison walls, there was a “real” difference between the sexes that justified the exclusion of women, because women, not men, would be subject to sexual assault by inmates:

A woman’s relative ability to maintain order in a male, maximum-security, unclassified penitentiary of the type Alabama now runs could be directly reduced by her womanhood. There is a basis in fact for expecting that sex offenders who have criminally assaulted women in the past would be moved to do so again if access to women were established within the prison. There would also be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women.<sup>123</sup>

*Dothard v. Rawlinson* was criticized by many for its holding that a man’s propensity to assault a woman can justify restrictions on her employment. Justice Marshall addressed the major objections in his dissent:

[T]he fundamental justification for the decision is that women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women that women, wittingly or not, are seductive sexual objects. The effect of the decision, made I am sure with the best of intentions, is to punish women because their very presence might provoke sexual assaults. It is women who are made to pay the price in lost job opportunities for the threat of depraved conduct by prison inmates.<sup>124</sup>

Commentators focused on the social stereotyping they saw in the characterization of female guards and male inmates. The exclusionary policy that limited women’s employment in prisons “rests on the stereotype of male aggression and female vulnerability.”<sup>125</sup> “[W]hatever the role of biology as a source of sexual attraction between women and men, the extent of male sexual assault on women is determined by culture.”<sup>126</sup>

But to characterize sex differences in sexual assault as mere stereotype goes too far. Whether sexually assaultive behavior is a biological problem or a cultural problem, it is no less of a *male* problem. The more pertinent question to ask is to what extent can women be burdened because of the sexual pathology of men?

---

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 345 (Marshall, J., concurring in part and dissenting in part).

<sup>125</sup> Law, *supra* note 91, at 1014 n.217.

<sup>126</sup> Freedman, *supra* note 52, at 936.

The same questions were at issue in *Michael M. v. Superior Court*.<sup>127</sup> In *Michael M.*, a 17-year-old male convicted of statutory rape challenged the underlying statute that criminalized his behavior but not the behavior of his underage, presumably consenting,<sup>128</sup> female partner. The Court upheld the law's sex-based distinction by concluding that males and females were not similarly situated with respect to the purpose of the statute—the prevention of illegitimate teenage pregnancy.<sup>129</sup> However, the way the Court approached the “similarly situated” analysis avoided the real issues at hand.

In concluding that “young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse,”<sup>130</sup> the Court focused on the very simplistic—and inarguable—difference that females could become pregnant and males could not. The statute simply leveled the risk between males and females, because females were already deterred from sexual activity by the prospect of pregnancy. Although there was little evidence that the statute was ever designed to prevent teenage pregnancy (and little evidence that it did, even if it was so designed), the Court denied the more obvious justification behind the statute's singular focus on males. It insisted that the sex-based distinction did not rely on “the assumption that males are generally the aggressors,”<sup>131</sup> even though almost everyone assumed that it did, from the dissenters to the many commentators who have either criticized or supported the decision.

Dissenting, Justice Stevens saw the sex-based disparity in criminal enforcement as nothing more than an overbroad generalization about the culpability of men in their relationships with young women:

Any such judgment [that the male is more typically responsible] must, in turn, assume that the decision to engage in the risk-creating conduct is always—or at least typically—a male decision. . . . I think it is supported to some extent by traditional attitudes toward male-female relationships. But the possibility that such a habitual attitude may reflect nothing more than an irrational prejudice makes it an insufficient justification for discriminatory treatment that is otherwise blatantly unfair.<sup>132</sup>

Others agreed, finding the same impermissible stereotyping of women and men

---

<sup>127</sup> 450 U.S. 464 (1981) (plurality opinion).

<sup>128</sup> The facts of the case show that the sexual relations were far from consensual. *Id.* at 485–487 n.\* (Blackmun, J., concurring).

<sup>129</sup> See *id.* at 470.

<sup>130</sup> *Id.* at 471.

<sup>131</sup> *Id.* at 475.

<sup>132</sup> *Id.* at 501 (Stevens, J., dissenting).

that critics saw in *Dothard v. Rawlinson*. The idea that sexual aggression or assertiveness was a male problem was just an "overbroad stereotype about the sexes."<sup>133</sup> *Michael M.*, like *Dothard v. Rawlinson*, was yet another example of "the judges' apparently uncontrollable urge to use ancient canards about the sexuality of men and women to resolve cases that come before them."<sup>134</sup> This view of female and male sexuality is simply irrational prejudice, "accept[ing] and reinforc[ing] the sex-based stereotypes that men are naturally, biologically aggressive in relation to sex, while women are sexually passive, and that young women need the law's protection from their own weakness."<sup>135</sup>

But what makes these assumptions about male sexuality "ancient canards"? Are they irrational stereotypes, or are they reality? *Michael M.* would have been a better-reasoned decision had its "similarly situated" analysis expressly focused on the observation that young women are not similarly situated with males of any age with respect to sexual behavior and the decision to engage in sexual behavior.<sup>136</sup> Professor Olsen has supported this more honest appraisal of the Court's decision, advocating that "we should acknowledge the present reality of pervasive male sexual aggression in our society and devise ways to change it rather than deny it as an 'outmoded stereotype.'"<sup>137</sup> In determining whether women and men are similarly situated for purposes of equal protection, feminists do not have to "pretend that there is no difference between male and female sexuality as they are presently constructed by our society."<sup>138</sup>

Professor MacKinnon agrees that the cause of the differences between female and male sexuality is less important than the effects those differences have. In her view, laws addressing sexual behavior may be facially neutral, but

---

<sup>133</sup> Freedman, *supra* note 52, at 933. "A much more plausible explanation for the state's choice to penalize only males for sexual intercourse involving teenage girls was the assumption that when such conduct occurs, males are the aggressors and females are their victims." *Id.* at 932.

<sup>134</sup> Williams, *supra* note 53, at 188-89 n.75; *see also id.* at 186 ("The Court's opinion, I believe, is implicitly based on stereotypes concerning male sexual aggression and female sexual passivity, despite Justice Rehnquist's express denial of that possibility.").

<sup>135</sup> Law, *supra* note 91 at 1000; *see also id.* at 1014 n.217 (categorizing both *Dothard v. Rawlinson* and *Michael M.* as relying on "the stereotype of male aggression and female vulnerability").

<sup>136</sup> This proposition calls into question the basic assumption that statutory rape involves equally consenting participants. *See Michael M. v. Superior Court*, 450 U.S. 464, 493 n.7 (1981) (Brennan, J., dissenting) (wondering why a minor female who "consented" to an act of sexual intercourse would ever make a complaint of statutory rape to the police).

<sup>137</sup> Olsen, *supra* note 91 at 424. Professor Olsen also recognizes the dilemma of *Michael M.*: Should difference be acknowledged at the risk of perpetuating that difference, or should difference be ignored at the risk of changing nothing? *See id.* at 412.

<sup>138</sup> *Id.* at 426 n.189.

that does not make them neutral in impact: "Sexual assault cannot be treated as gender neutral because sexual assault is not gender neutral."<sup>139</sup> Dismissing differences between men and women as merely stereotypical can obscure the fact that sexually aggressive behavior is still only male behavior.<sup>140</sup>

While *Michael M.* illustrated the Court's willingness to permit legal distinctions between women and men based on differences in sexual behavior, the benefits women obtained did not come without cost. The Court, of course, focused on the more immediate, tangible harm to the defendant, who was criminally prosecuted for his behavior.<sup>141</sup> The statutory rape provision, however, also resulted in harm to young women. Minor females were legally unable to engage in sexual intercourse with anyone, but males of all ages were free to be sexually active provided their partners were adult women. The decision "accepts and reinforces the sex-based stereotype that young men may legitimately engage in sexual activity and young women may not" and "denies the possibility of female sexuality."<sup>142</sup>

Both *Dothard v. Rawlinson* and *Michael M.* hold that the law of equal protection permits sex-based restrictions on the lives of women in an effort to protect them from the aggressive sexual behavior of men. When female and male sexual behavior is at issue, women and men are not similarly situated and need not be treated the same under the law. The same theme can be found just below the surface of *Rostker v. Goldberg*, as one of the justifications for excluding women from combat seems lifted from the quasi-military, quasi-combat prison environment of *Dothard v. Rawlinson*. Just as female prison guards can be excluded because they might be sexually assaulted by men, women are excluded from combat, in part, based on similar dangers of male sexuality.<sup>143</sup> "[F]ear of sexual relations in combat units is a prime example of blaming the victim. By their mere presence, women are seen as a magnet for

---

<sup>139</sup> Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1306 (1991) [hereinafter MacKinnon, *Reflections*].

<sup>140</sup> See *id.* at 1304-05. "The dissent [in *Michael M.*] revealed more concern with avoiding the stereotyping attendant to the ideological message the law communicated than with changing the facts that make the stereotype largely true. . . . Underage girls form a credible disadvantaged group for equal protection purposes when the social facts of sexual assault are faced, facts which prominently feature one-sided sexual aggression by older males." *Id.* at 1305.

<sup>141</sup> See *Michael M.*, 450 U.S. at 475-76.

<sup>142</sup> Law, *supra* note 91 at 1001.

<sup>143</sup> Professor Lucy Katz compared *Michael M.* and *Rostker v. Goldberg* in a way that would be equally applicable to *Dothard v. Rawlinson*: "Both opinions imply a strong belief that women must be protected from the sex drives of men, even if that means tolerating substantial inequalities between them." Katz, *supra* note 44, at 40-41.

anti-militaristic, sometimes sexually aggressive, behavior in men.”<sup>144</sup>

The analogy of *Dothard v. Rawlinson* to the management of sexual behavior and aggression in the military is particularly strong. Prisons are mostly male, strictly hierarchical, and institutionally standard, although they sometimes break down into a “jungle atmosphere.”<sup>145</sup> *Dothard v. Rawlinson* even relied on the same bathroom and shower concerns that played such a large role in sensationalizing the debate over gay servicemembers. The Court carefully plotted out the location and design of the prison’s personal facilities in explaining why women could not supervise them. A guard’s duties “would require patrolling dormitories, restrooms, or showers while in use, frequently, during the day or night.”<sup>146</sup> “[I]nmate living quarters are for the most part large dormitories, with communal showers and toilets that are open to the dormitories and hallways.”<sup>147</sup>

However much one might criticize an interpretation of equal protection law that places legal restrictions on women based on the expectation that men will assault them—and it should be criticized on that basis—the exclusion of gay women from the military is something very different. At least in *Dothard v. Rawlinson* and *Michael M.*, women were restricted based on the fear of men’s sexual misbehavior against women. With the military’s exclusionary policy against gay servicemembers, however, gay women are restricted from service based on the fear of men’s sexual misbehavior *against other men*. Under existing Supreme Court precedent, even if women’s burden of restriction could be balanced against women’s benefit of protection, it seems impermissible that women could be disproportionately burdened in an effort just to protect men from one another.

---

<sup>144</sup> *Id.* at 28; *see also id.* at 41 (noting that women in combat units “are assumed inevitably to be either targets of male aggression or temptresses to such aggression”); Peach, *supra* note 44, at 214 (noting the military’s fear that if women serve in combat units, “men will be preoccupied with taking the sexual favors of women rather than concentrating on their mission”); TIMBERG, *supra* note 72 at 261, 397 (“Women [at the Naval Academy] were a distraction to the men, . . . ‘poisoning’ their preparation for combat command.”) (statement of James Webb, who later became the Secretary of the Navy).

<sup>145</sup> *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

<sup>146</sup> *Id.* at 325 n.6.

<sup>147</sup> *Id.* at 326. Justice Marshall was amused by this sudden concern with inmate privacy, which must have been at the bottom of the list of Alabama’s concerns before the issue of female prison guards arose. *See id.* at 346 n.5 (Marshall, J., concurring in part and dissenting in part). Anyone who has been in the military should be similarly amused by its newly-found interest in preserving the privacy of servicemembers.

### D. *The 1993 Congressional Debate: Concerns About Male Sexuality and Violence*

The most striking thing about the congressional hearings held on President Clinton's proposal to recruit and retain gay servicemembers was that it was almost entirely an all-male show. For the most part, male Senators and Representatives discussed with male witnesses their mutual concerns about whether straight military men would serve alongside gay men. The proceedings were rife with fear, ignorance, and an adolescent level of immaturity about homosexuality.<sup>148</sup>

---

<sup>148</sup> The moment that best captured the level of discourse, in my view, was a colloquy involving Senator Sam Nunn of Georgia, the chairman of the Senate Armed Services Committee, and Senator William Cohen of Maine. It is reminiscent of how young boys tease each other during school recess, calling each other homosexuals without really understanding what they are talking about:

Senator COHEN. [H]e says to his colleagues, I am gay . . . Or they come to you and say, he is gay. What does that present you with, in terms of a decision at that time? . . .

. . . .

General WALLER. If the person then comes in to me, I call him in—let us say his name is Cohen.

Senator COHEN. Let us not say his name is Cohen. [Laughter.]

General WALLER. Let us say his name is Nunn. [Laughter.] Let us say his name is Fudpucker. [Laughter.] . . .

. . . .

Chairman NUNN. But as I understand it now, if, General Waller, someone came in and said to you, Senator Cohen or Bill Cohen has violated the Uniform Code of Military Justice Act on sodomy, now that is a criminal violation. At that stage—

Senator COHEN. Let us correct that hypothetical. [Laughter.]

Chairman NUNN. The last correction did not work. I am not going to try. [Laughter.]

. . . .

Chairman NUNN. Let me pose one question. Senator Cohen, let us just—since there are just two of us here—bat it back and forth.

Senator COHEN. I will not use your name if you do not use mine. [Laughter.]

*Senate Hearings*, *supra* note 1, at 435–41. General Waller later denied that his use of the word “Fudpucker” was intended to approximate a vulgar slur used against gay men. *See id.* at 437.

Senator Nunn has a long history and long bloodlines in the business of restricting military service by disfavored groups. In the Senate Armed Services Committee hearings that preceded *Rostker v. Goldberg*, 453 U.S. 57 (1981), Senator Nunn concluded that “equity” was not a relevant issue with respect to the registration of women; women should not be

Most of the time female servicemembers were mentioned, it was for the purpose of explaining that the subject matter at hand did not apply to them. Professor Charles Moskos<sup>149</sup> explained that his testimony had no application to military women: "[M]y focus is on male homosexuals or gays. This is not to understate the role of lesbians but rather to avoid confusion that may arise from the different social dynamics between lesbians and straights as compared to gays and straights."<sup>150</sup> In his view, the service of gay women in the military was relatively uncontroversial.<sup>151</sup> Another expert witness, Professor Judith Stiehm,<sup>152</sup> followed up on Professor Moskos's comment by observing that "the issue seems to be very different" for gay women.<sup>153</sup> She suggested to the Senate committee that "possibly something might be learned about why tolerance seems to be higher there."<sup>154</sup> Retired Colonel Lucian Truscott III<sup>155</sup> testified that the military's exclusionary policy is not justified by national security concerns, but on the belief that "sex acts between men" are "immoral, or evil, or sinful."<sup>156</sup> Colonel Truscott then explained his specific choice of words: "I use the phrase 'sex acts between men' because I think that most men

---

registered because "there is no military necessity for this." *Id.* at 80. More than thirty years earlier, Senator Nunn's grand-uncle, Representative Carl Vinson, had done his part to maintain the second-class status of military women. Displeased with legislation that permanently integrated women as full-fledged members of the military, Representative Vinson used his influence as Chairman of the House Armed Services Committee to ensure that women would not be able to serve in the Navy at sea. JEAN ZIMMERMAN, *TAILSPIN: WOMEN AT WAR IN THE WAKE OF TAILHOOK* 155, 161-62 (1995). "Just fix it so they cannot go to sea at all." *Id.* at 162; *see also* Schlesinger v. Ballard, 419 U.S. 498, 512 (1975) (Brennan, J., dissenting) ("[T]he Women's Armed Services Integration Act of 1948, . . . while providing for the first time a permanent role for women in the military, severely limited their career opportunities.").

<sup>149</sup> *See supra* note 7 and accompanying text.

<sup>150</sup> *Senate Hearings, supra* note 1, at 349.

<sup>151</sup> *See supra* note 8 and accompanying text.

<sup>152</sup> Professor Stiehm is a political scientist who has written extensively about women in the military. *See* JUDITH H. STIEHM, *ARMS AND THE ENLISTED WOMAN* (1989); JUDITH H. STIEHM, *BRING ME MEN AND WOMEN: MANDATED CHANGE AT THE U.S. AIR FORCE ACADEMY* (1981).

<sup>153</sup> *See Senate Hearings, supra* note 1, at 393.

<sup>154</sup> *Id.*

<sup>155</sup> Colonel Truscott is the son of a WWII four-star general, *House Armed Services Hearings, supra* note 1, at 4, but may be better known today as the father of author and Vietnam combat officer Lucian K. Truscott IV. The youngest Truscott wrote the 1979 novel "Dress Gray," a story about a gay cadet at the United States Military Academy at West Point. *See id.* at 6-7.

<sup>156</sup> *House Armed Services Hearings, supra* note 1, at 8.



are completely indifferent about physical contact between lesbians.”<sup>157</sup>

Even when gay women in the military are not expressly excluded from the scope of the discussion, the way in which issues are framed can make it clear that only men are at issue. Even female authorities can wear the same narrow blinders. For many years Major Melissa Wells-Petry, an Army lawyer, has been the military’s “point person” in formulating justifications to exclude gay servicemembers,<sup>158</sup> but her focus has been on men, not women. For example, in arguing that the “Don’t Ask, Don’t Tell” policy was an inconsistent substitute for an across-the-board exclusion, she suggested that a servicemember might never tell anyone he was gay but still engage in anonymous sex, or might tell everyone he was gay but be unable to have sexual relations because of impotence.<sup>159</sup> I doubt Wells-Petry was thinking that women would have anonymous sex or become impotent.<sup>160</sup>

After her testimony before Congress, Professor Stiehm published an article, *The Military Ban on Homosexuals and the Cyclops Effect*,<sup>161</sup> that examined the invisibility of women during the debate. She concluded that the primary concerns about gay servicemembers were male concerns: fear of aggressive sexual behavior and fear of violence against gay servicemembers.<sup>162</sup> These concerns, however, were not tied to the service of gay women:

The military’s exclusion of homosexuals is an example of men supporting

---

<sup>157</sup> *Id.*

<sup>158</sup> See MELISSA WELLS-PETRY, EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVE (1993). Wells-Petry has left the military and now represents the Family Research Council, which opposes military service by gay citizens. See Melissa Wells-Petry, *Sneaking a Wink at Homosexuals? Three Case Studies on Policies Concerning Homosexuality in the United States Armed Forces*, 64 UMKC L. REV. 3 n.\* (1995). Wells-Petry filed an amicus curiae brief supporting the discharge of Lieutenant Paul Thomasson in *Thomasson v. Perry*, 80 F.3d 915, 919 (4th Cir. 1996) (en banc), cert. denied, 117 S. Ct. 358 (1996).

<sup>159</sup> See Wells-Petry, *supra* note 158, at 39 n.149.

<sup>160</sup> In the process of explaining why the “Don’t Ask, Don’t Tell” policy fails to exclude as categorically as it should, Wells-Petry also equated “homosexual sex” with illegal sodomy. In her view, “a moment’s reflection on human anatomy” established that sodomy was the only option for physical intercourse. See *id.* at 13 n.42. An equally brief reflection would show that she was thinking only about men. See also *Senate Hearings, supra* note 1, at 169 (testimony of Professor Saltzburg, an expert in military law) (“Generally speaking, in the case of homosexuals, almost any kind of sexual activity would be regarded as sodomy and, therefore, punishable.”).

<sup>161</sup> Judith Hicks Stiehm, *The Military Ban on Homosexuals and the Cyclops Effect*, in GAYS AND LESBIANS IN THE MILITARY: ISSUES, CONCERNS, AND CONTRASTS 149 (Wilbur J. Scott & Sandra C. Stanley eds., 1994)

<sup>162</sup> *Id.* at 152–54.

a policy grounded in arguments based on men's behavior and experience that binds both servicewomen and -men but that affects them differently. Hence, a policy for men and women designed primarily to control men's violent and/or shunning behavior ends by disproportionately punishing women—women whose behavior was not identified as a problem (apart from violating the regulation).<sup>163</sup>

The themes of sexual aggressiveness and violence identified in Dr. Stiehm's work provide a useful outline for reviewing the military's purported rational basis for its exclusionary policy. The first, the fear of sexual aggressiveness, was based almost entirely on notions of male sexual behavior in groups of men.<sup>164</sup> These different notions of female and male sexual behavior in same-sex groups came across very strongly in the military surveys undertaken for purposes of the debate.

Results of military surveys, of course, have to be taken in context. In such a hierarchical organization, servicemembers quickly learn "the lay of the land" and are more apt to line up behind the public opinions of their senior officers. Senator John Kerry reminded his colleagues of this basic flaw<sup>165</sup> in military opinion taking, characterizing the degree of opposition to gay servicemembers as misleading because it is driven by "a leader-supported status quo."<sup>166</sup> Given

---

<sup>163</sup> *Id.* at 149.

<sup>164</sup> Fears of sexually aggressive women were not completely absent from the congressional debate. These concerns, however, were seemingly added as an afterthought, in an effort to say something—anything—about gay women in the military. In almost two thousand pages of congressional testimony, aggressive behavior by women was mentioned four times, although it was unclear to what extent different witnesses may have been discussing the same historical incident. In three instances, witnesses described circumstances in which a female drill instructor had abused her position of authority by initiating an intimate relationship with a female recruit. *See Senate Hearings, supra* note 1, at 605, 755; *House Armed Services Hearings, supra* note 1, at 98. In the fourth, one female recruit had behaved aggressively toward another female recruit. *House Armed Services Hearings, supra* note 1, at 100. One of the four incidents apparently took place in the 1970s, which illustrates the grasping nature of the effort to be inclusive of women. *See Senate Hearings, supra* note 1, at 634.

<sup>165</sup> The other basic flaw, which should be amusing to anyone who has served in the military, is that military decisions are normally not made based on the popular vote of the troops.

<sup>166</sup> *Senate Hearings, supra* note 1, at 490; *see also id.* at 256 (testimony of Dr. Lawrence Korb, Assistant Secretary of Defense under President Reagan) ("Given the cues they have received from their top leadership and the innate conservatism of the military institution, [the opposition] should not be surprising."). Major Kathleen Bergeron noted that young officers often join the military with tolerant attitudes, but they are quickly socialized to reject gay servicemembers. *Id.* at 634.

that context, it is surprising that any servicemember would give an opinion inconsistent with the wishes of military leadership.<sup>167</sup> To the extent that servicemembers disagreed, though, they were disproportionately women.

The *only* factor on which a survey conducted by Laura Miller found a significant difference in opinion was the sex of the respondent: not race, rank, educational level, religion, marital status, parenthood, or geographic origin.<sup>168</sup> Different conceptions of female and male sexual behavior dominated the results: more than twice as many women as men favored lifting the ban on gay servicemembers; nearly twice as many men as women disagreed with lifting the ban.<sup>169</sup> The behavior of male and female respondents was starkly different even *during* the survey. Male respondents had "raised voices" and "red faces,"<sup>170</sup> while many women wondered "what's the big deal."<sup>171</sup> The "big deal" was fear of male sexual behavior in all-male groups:

The idea of being approached by gays, being perceived as gay, or being overpowered by gays brings out violent reactions in many male soldiers. The distress stems not only from unwanted advances, pro-ban soldiers say, but also from having been perceived as open to an invitation.

. . . .

. . . Common in the interviews and written comments from men were statements like: "It's not right. It's sick, it's despicable, nauseating and I'll kill them."<sup>172</sup>

The differences in sexuality-related concerns did not surprise Professor Moskos. "[I]t is a male thing. And we are probably more sexually insecure. That is the nature of the beast. And I think that is the reason you find males much more uptight over this question than you do women."<sup>173</sup>

Similar differences between female and male sexuality were also observed in civilian police and fire departments with openly gay officers. These units were surveyed as part of a comprehensive research report sponsored by the

---

<sup>167</sup> It is also likely that a servicemember who expressed support for ending the exclusionary policy would be suspected of being gay, yet another incentive for backing the status quo.

<sup>168</sup> Laura L. Miller, *Fighting for a Just Cause: Soldiers' Views on Gays in the Military*, in *GAYS AND LESBIANS IN THE MILITARY: ISSUES, CONCERNS, AND CONTRASTS* 69, 85 n.3 (Wilbur J. Scott & Sandra C. Stanley eds., 1994).

<sup>169</sup> RAND REPORT, *supra* note 1, at 216 tbl. 7-2. The RAND Report contains corrected figures from the survey results in Miller, *supra* note 168.

<sup>170</sup> Miller, *supra* note 168, at 75.

<sup>171</sup> *Id.* at 79.

<sup>172</sup> *Id.* at 80-81.

<sup>173</sup> *Senate Hearings*, *supra* note 1, at 424.

Secretary of Defense and the Joint Chiefs of Staff, under the assumption that the experience of these paramilitary organizations could be instructive for the military services.<sup>174</sup> Just as in the military, “[d]ifferences in climate were likewise apparent across gender lines, with women being far less likely to view homosexuality as being offensive, troublesome, and threatening.”<sup>175</sup>

Only one military witness was asked why women were less likely to consider gay servicemembers a threat to unit cohesion. Major Kathleen Bergeron was probably asked because she was one of the very few women who participated in the hearings at all. After carefully establishing her heterosexual credentials—married and the mother of two<sup>176</sup>—she said she had no explanation why surveys showed that military women were more in favor of lifting the ban: “The women, of course, that I associate with and talk with would all support the current DOD ban.”<sup>177</sup>

Major Bergeron, however, apparently also believes that none of her fellow servicemembers are gay. Whether through obliviousness or lack of candor, she testified that the Marines in her unit “shared the same cultural [read sexual] orientation” and “did not have to guess” about one another.<sup>178</sup> It is ironic that Major Bergeron sees herself as knowing her Marine troops very well,<sup>179</sup> but has no idea that she works with and associates with a significant number of gay people, particularly gay women. As incredible as it was, her testimony was not unusual. General Colin Powell, then-Chairman of the Joint Chiefs of Staff,

---

<sup>174</sup> RAND REPORT, *supra* note 1, at 106. The short shelf life of the RAND Report illustrates the outcome-oriented nature of the congressional hearings. The 518 page report was “the most comprehensive treatment of the subject to date.” Lawrence Korb, *Evolving Perspectives on the Military's Policy on Homosexuals: A Personal Note*, in GAYS AND LESBIANS IN THE MILITARY: ISSUES, CONCERNS, AND CONTRASTS 219, 228 (Wilbur J. Scott & Sandra C. Stanley eds., 1994). The report, however, came to the “wrong” conclusion, finding that sexual orientation (and the private conduct that naturally accompanies sexual orientation) was “not germane to determining who may serve in the military.” RAND REPORT, *supra* note 1, at xviii. As a result, no witnesses were called before the congressional committees to discuss the report, over the objections of senators and representatives favoring a change in the exclusionary policy. SENATE REPORT, *supra* note 1, at 312–13; HOUSE REPORT, *supra* note 1, at 493, 506–07. When Representative Meehan of Massachusetts asked why the results of a study that taxpayers paid \$1.3 million to complete had not been released, Secretary of Defense Les Aspin stonewalled by responding, “You mean *before* you act on this issue?” *House Military Forces Hearings*, *supra* note 1, at 73 (emphasis added).

<sup>175</sup> RAND REPORT, *supra* note 1, at 124.

<sup>176</sup> *Senate Hearings*, *supra* note 1, at 603.

<sup>177</sup> *Id.* at 620.

<sup>178</sup> *Id.* at 603.

<sup>179</sup> *Id.* at 604 (“We are truly an extended family, that shares every aspect of our lives.”).

believed that he had not known a single gay servicemember at any time during his career, other than those who were discovered and involuntarily discharged.<sup>180</sup>

While differences between men and women were rarely mentioned, fear of assault by gay men was a recurring theme. When General Schwarzkopf was asked if there were problems with homosexuality during the Persian Gulf War, he related an incident in which a soldier was found publicly soliciting sex from civilians in the local marketplace.<sup>181</sup> I assume, although he did not say and he was not asked, that the soldier was male. General Schwarzkopf also submitted to the committee an affidavit justifying the gay ban that he had filed in an earlier lawsuit.<sup>182</sup> The statement is illuminating because it shows the assault-based nature of the justification at a time before the military "cleaned up" its legal arguments for public view during the most recent debate:

Homosexuals in military service have a direct, adverse impact on the morale of other Army members. Homosexuals tend to polarize units. I am aware of instances where heterosexuals have been solicited to commit homosexual acts, and, even more traumatic emotionally, physically coerced to engage in such acts. Such instances of homosexual conduct clearly destroy morale and elevate hostility toward homosexuals.<sup>183</sup>

In the view of senior officers, opposition to gay servicemembers was based on "rational fear."<sup>184</sup> Some characterized that fear more colorfully than others, but there is little doubt that the fear was of male sexuality. Colonel Frederick Peck testified that, if the ban was lifted, he would be tempted to warn a prospective recruit, "You are sentencing yourself to four years in a gay bath house."<sup>185</sup> Allowing gay citizens to serve would be, according to retired General William Weise, like "putting a hungry dog in a meat shop."<sup>186</sup>

Themes of violence were also prominent in the hearings. Gay servicemembers should be excluded because the military feared their straight counterparts might kill them in rage.<sup>187</sup> Colonel Peck believed it was "a

---

<sup>180</sup> *House Military Forces Hearings*, *supra* note 1, at 62.

<sup>181</sup> *Senate Hearings*, *supra* note 1, at 631.

<sup>182</sup> See *Matthews v. Marsh*, 755 F.2d 182, 182 (1st Cir. 1985) (vacating the district court's decision on the basis of newly discovered evidence).

<sup>183</sup> *Senate Hearings*, *supra* note 1, at 598.

<sup>184</sup> *Id.* at 617-18.

<sup>185</sup> *Id.* at 643.

<sup>186</sup> *House Armed Services Hearings*, *supra* note 1, at 165.

<sup>187</sup> *Senate Hearings*, *supra* note 1, at 602. Note that the same fundamental theme prevails: the military must exclude categories of citizens who are subject to the inappropriate behavior of others, although it need not exclude categories of citizens who engage in

definite possibility" that "straight males would probably murder gays."<sup>188</sup> Despite the degree of discipline and control that usually prevails in the military, none of the senior officers believed they could do anything to stop the violence. One officer recalled that "on a number of occasions" gay men were thrown overboard at sea.<sup>189</sup> He was nonchalant about the deaths: "Of course, we conducted an investigation. We do all the proper things. But the fact is, the man is gone."<sup>190</sup>

In military-speak, to say that violence against gay servicemembers cannot be prevented is very nearly the same thing as saying the military will look the other way if it happens.<sup>191</sup> Senator John Warner of Virginia even suggested that gay servicemembers currently in the military should have the right to break their enlistment contracts if the ban is lifted, based on the "substantial risk" of physical danger.<sup>192</sup> Representative Ronald Dellums of California, the chairman of the House Armed Services Committee, was so disturbed by the tone of his committee's hearing that he felt it necessary to stop the questioning and expressly establish on the record that the military witnesses were not advocating the murder of gay servicemembers.<sup>193</sup>

It is difficult to imagine that any of the participants in this debate saw the

---

inappropriate behavior. Just as women have been barred from combat duty in part because their mere presence might provoke sexual assault, *see supra* note 143 and accompanying text, gay servicemembers should be barred because their mere presence might elicit disgust or violent assault.

<sup>188</sup> *Id.* at 615.

<sup>189</sup> *House Armed Services Hearings, supra* note 1, at 171.

<sup>190</sup> *Id.* at 171; *see also id.* (testimony of retired Master Chief Chuck Jackson) ("I can't think of a way that we could specifically control or decrease the things that might happen.").

<sup>191</sup> The most discouraging aspect of Colonel Peck's testimony, *see supra* note 185 and accompanying text, was that he used the fact that he has a gay son to bolster the credibility of his testimony against gay servicemembers. "[H]e would be at grave risk if he were to follow in my footsteps as an infantry platoon leader or a company commander. I would be very fearful that his life would be in jeopardy from his own troops." *Senate Hearings, supra* note 1, at 602. At the same time he claimed to only be protecting his son from violence, his testimony contributed to the likelihood of violence against gay servicemembers. Still, Senator Nunn thought that Colonel Peck was "a father that cares deeply about his own children." *Id.* at 645.

During the Vietnam War, breakdowns in unit loyalty led to an increasing incidence of "fraggings," deliberate attempts by soldiers to kill their own officers. *Id.* at 265. I doubt that then-Lieutenant Peck would have been satisfied if the military's only response had been that it was "a definite possibility" Peck would be killed by his own men, but there was nothing that could be done to reduce that possibility.

<sup>192</sup> *Senate Hearings, supra* note 1, at 643.

<sup>193</sup> *House Armed Services Hearings, supra* note 1, at 172-73.

problem of potential violence as anything other than a male problem. No one contemplated that women would kill one another in uncontrollable anger if gay women were permitted to serve in the military, yet they were excluded equally with men on the basis of a justification that is completely irrelevant to women.

The military's singular attention to the problems of male sexuality and male violence persisted after the policy was drafted. In implementing "Don't Ask, Don't Tell," the Department of Defense released a "Training Plan"<sup>194</sup> to assist the services in understanding the new regulatory scheme. The Training Plan set out a number of hypothetical situations—presumably those that the military saw as common applications of the policy—and provided answers showing how the situations should be resolved. The same themes of male aggressiveness surfaced in the fact patterns, with many suggesting either hyper-promiscuity,<sup>195</sup> sex in public places such as parks and rest rooms,<sup>196</sup> unprofessional public displays,<sup>197</sup> or threats of violence.<sup>198</sup>

*Rostker v. Goldberg*<sup>199</sup> warned against sex-based distinctions that are "accidental by-products of a traditional way of thinking about females."<sup>200</sup> The

<sup>194</sup> Memorandum from Edwin Dorn, Assistant Secretary of Defense, *Training Guidance for DoD Policy on Homosexual Conduct in the Armed Forces* (Dec. 21, 1993).

<sup>195</sup> *Id.* (Situation 8). This particular hypothetical situation reads like a homophobic law school exam. The fact pattern imagines two servicemen found en flagrante in an act of sodomy in a barracks room. Furthermore, these sexual relations take place in plain view of photographs of one of the apprehended men engaging in sodomy with a number of *other* servicemen. Finally, law enforcement authorities discover a love letter from the same man addressed to *yet another* servicemember. The hypothetical asks whether the commander can investigate the long list of servicemen implicated in the photographs and the letter.

<sup>196</sup> *Id.* (Situations 2, 10, 11).

<sup>197</sup> *Id.* (Situation 6). Interestingly, this hypothetical is the only one of fourteen to feature a female servicemember. The fact pattern shows her marching in a gay rights parade, carrying a placard that says "Lesbians in the military say, 'Lift the Ban!'" The hypothetical is highly unrealistic, as most servicemembers—particularly women—would be unlikely to take part in an event characterized, at least in large part, by sexually explicit displays. See Mazur, *supra* note 12, at 247 n.106.

<sup>198</sup> *Dorn, supra* note 194 (Situation 4).

<sup>199</sup> 453 U.S. 57 (1981).

<sup>200</sup> *Id.* at 74 (quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (Stevens, J., concurring)). This standard, though, was very easy to meet. Because Congress expressly considered whether women should register for the draft, apparently its decision could no longer be "accidental." Instead, the exclusion of women from draft registration might be more accurately seen as a *purposeful* by-product of a traditional way of thinking about females. "Congress was fully aware . . . of the current thinking as to the place of women in the Armed Services." *Id.* at 71. "The principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people." *Id.* at 77 (quoting S. REP. NO. 96-826 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2612, 2647);

kind of traditional thinking, however, that leads to an "accidental" distinction on the basis of sex, usually assumes that women are very different from men. In the context of the policy excluding gay servicemembers, ironically, traditional thinking either assumes that gay women are just like gay men, or fails to think about gay women at all.

Justifications for the exclusionary policy that rely on these fears of aggressive male sexuality and violence in same-sex groups simply cannot provide a rational basis for the exclusion of women. Under the constitutional standard for equal protection on the basis of sex, the state cannot rely on "archaic and overbroad generalizations" about women to treat women differently.<sup>201</sup> But under the military's policy excluding gay servicemembers, the state relies on archaic and overbroad generalizations *about gay men* to restrict the service of gay women—and disproportionately so. This could not have been the way the Supreme Court intended its equal protection doctrine to apply.

Equal protection law was intended to focus on sex-based distinctions that "perpetuate[d] historical patterns of discrimination" against women.<sup>202</sup> How ironic it would be if the language of equal protection was somehow used to require the exclusion of women from an institution in which they have played an important historical role, as gay women have done in the military. Although *Dothard v. Rawlinson*<sup>203</sup> and *Michael M. v. Superior Court*<sup>204</sup> permitted legal classifications that burdened women in an effort to protect them from the distinctive nature of male sexuality, it is without precedent to restrict women based on the dangers that male sexuality poses to other men.

The result could not be more unjustifiably one-sided. Not only does the military fail to offer any rational basis for the exclusion of gay women from the military, but because there are proportionately greater numbers of gay women as compared to gay men, the exclusionary policy will more often burden women's careers. Most ironically, the policy may disproportionately burden women for yet another reason. Even though both congressmen and military men were motivated by concerns about male sexuality, they have unintentionally drafted a policy that disproportionately targets female sexuality.

Major Wells-Petry captured the essence of the policy's focus: "DoD

---

*accord* Michael M. v. Superior Court, 450 U.S. 464, 471 n.6 (1981) (plurality opinion) (concluding that California's rejection of sex neutrality for its statutory rape statute could not have been an "accidental by-product of a traditional way of thinking about females," because the legislature had actually considered the issue).

<sup>201</sup> J.E.B. v. Alabama, 511 U.S. 135 (1994) (citations and internal quotations omitted).

<sup>202</sup> *Id.* at 139 n.11.

<sup>203</sup> 433 U.S. 321 (1977).

<sup>204</sup> 450 U.S. 464 (1981) (plurality opinion).



imparted that its focus was not on mitigating the *occurrence* of homosexual conduct within the armed forces, but on mitigating the possibility that homosexuals would be *caught* engaging in homosexual conduct.”<sup>205</sup> In other words, the military would agree in the abstract that gay citizens have and always will serve in the military, as long as it never had to be reminded that it was really true.

The range of every-day behavior that can trigger an investigation for “homosexual conduct” is far broader than the intimacy suggested by the usual meaning of the phrase. The military can rely on any “credible information” showing that a servicemember might be gay, provided the information exceeds the level of pure rumor or suspicion. For example, a report that a civilian woman has moved with a female servicemember to a new duty assignment, or an observation that two women share a small apartment off-base, would justify the initiation of an investigation with a view to eventual discharge.<sup>206</sup> The only conduct that cannot affect a gay servicemember’s career is conduct that can be categorically hidden from the military’s notice. The policy therefore rewards furtive conduct over committed associations, as it is much easier to hide an isolated act than it is to hide a person whose presence has to be explained on a continuing basis.

Congressional witnesses also interpreted the policy to target visible associations rather than furtive conduct. The code words are “discreet”<sup>207</sup> and “private,”<sup>208</sup> but under the policy, servicemembers can be discreet and private only if their ongoing relationships never become known to anyone. As a result, the policy intrusively invades “private” associations that can never be completely hidden, but provides an escape for potentially more “public”—but hideable—conduct.<sup>209</sup> By favoring furtive, isolated sexuality that can be kept

---

<sup>205</sup> Wells-Petry, *supra* note 158, at 40 n.150; see also *House Military Forces Hearings*, *supra* note 1, at 213 (statement of Representative Jon Kyl of Arizona) (the message of the policy to gay servicemembers is “don’t get caught”).

<sup>206</sup> See Mazur, *supra* note 12, at 246–48.

<sup>207</sup> *Senate Hearings*, *supra* note 1, at 193 (testimony of Professor David Schluter) (under the policy, a servicemember would have to be “very discreet so that no one would find out”).

<sup>208</sup> *House Military Forces Hearings*, *supra* note 1, at 34–35 (testimony of Secretary of Defense Les Aspin) (“Under this policy, if you are gay and you mind your own business and keep your private life private, you can serve in the armed forces of the United States.”); *Senate Hearings*, *supra* note 1, at 709 (testimony of General Colin Powell) (“the policy . . . permits gay and lesbian Americans to serve if they are willing to keep their orientation a private matter”).

<sup>209</sup> Paradoxically, the same policy that would closely investigate private same-sex associations also allows servicemembers to participate in public activities that are more stereotypically gay, such as frequenting gay bars or marching in gay rights parades. The

completely secret from fellow servicemembers, the policy disproportionately burdens women.<sup>210</sup>

Professor William Eskridge has discussed relative differences in male and female sexuality in the context of arguing in favor of legal recognition of marriages between people of the same sex.<sup>211</sup> He noted the disproportionate tendency that gay women have toward committed long-term relationships,<sup>212</sup> contrasting the social or biological forces that contribute to a relatively greater degree of furtive sexuality in gay men:

Since at least the nineteenth century, gay men have been known for their promiscuous subcultures. Promiscuity may be a consequence of biology (men may be more naturally promiscuous than women; if so, all-male couples would exaggerate this trait), or it may be the result of acculturation (the peculiar way Western society defines virility). In the world of the closet, furtive behavior that is not only practically necessary but also addictively erotic may increase the likelihood of promiscuity. Whatever its source, sexual variety has not been liberating to gay men.<sup>213</sup>

Professor Eskridge suggested that same-sex marriage could provide a "civilizing"<sup>214</sup> influence for gay men who have lacked "a lesbian-like interest in commitment."<sup>215</sup>

These same relative differences in sexuality between men and women will inevitably result in a disproportionate application of the policy excluding gay servicemembers. When the policy targets visible associations instead of potentially invisible, fleeting conduct, women will find it disproportionately more difficult to avoid detection and discharge. Combined with the underlying

---

exception is intended to prevent First Amendment challenges by servicemembers theoretically seeking to educate themselves about homosexuality. See Mazur, *supra* note 12, at 246-47.

<sup>210</sup> See Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography*, 47 STAN. L. REV. 661, 681 (1995) ("heterocentrism and homophobia leave the young gay man fearing that gay sexual encounters are necessarily furtive"). Professor Sherman further explained: "The impression that most gay [male] sexual encounters are furtive and ephemeral may not be altogether wrong. Because casual, anonymous sexual encounters are more easily hidden than a steady, committed sexual relationship, homophobia fosters gay [male] promiscuity and instability . . ." *Id.* at 681 n.114.

<sup>211</sup> WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996).

<sup>212</sup> See *id.* at 9 (describing the "greater tendency toward bonding in committed pairs" in gay women), 83 ("The majority of surveys taken in the last twenty years have found more lesbians than gay men in committed long-term relationships.").

<sup>213</sup> *Id.* at 9-10.

<sup>214</sup> *Id.* at 9.

<sup>215</sup> *Id.* at 58.

reality that gay women are more likely to perform military duty, the inexplicable end result is that the ban on gay servicemembers inflicts a special burden on gay women. This special burden on women is only exacerbated by the fact that all of the justifications offered for their exclusion apply only to men.

#### V. THE CONSEQUENCES OF RE-MAKING DISTINCTIONS ON THE BASIS OF SEX—AND THE CONSEQUENCES OF FAILING TO DO SO

The prevailing assumption in feminist scholarship is that, in most cases, legal distinctions based on sex are difficult to limit and, in any event, are usually harmful to women in the long run. Even Professor MacKinnon, a critic of the “strict equality” approach to equal protection, has agreed that well meaning legal distinctions often backfire. “Some compensation for sex differences, often termed ‘special protections,’ have also been won, but most arguably have been more ideologically denigrating than materially helpful.”<sup>216</sup> Contrary to conventional wisdom, however, they need not have that effect. Legal classifications by sex can, under some circumstances, be ideologically positive *and* materially helpful.

Professor Law has argued that sex-based legal classifications related to reproductive biology can be appropriate, provided the classifications do not perpetuate stereotypical limitations on the place of women in public life. If such a law “had no discernable effect in oppressing women” or “all of the effects we can discern are beneficial to women,” no heightened scrutiny would be necessary.<sup>217</sup> Professor Law’s standard also limits the danger that a legal invitation to treat women differently from men could result in unfavorable as well as favorable treatment. Legal distinctions on the basis of sex would be permitted only when related to reproductive biology and would be prohibited if their effect was to “oppress[ ] women or reinforce[ ] cultural sex-role stereotypes.”<sup>218</sup> In the case of gay women in the military, ironically, it is the very *absence* of a distinction between men and women that leads to a disproportionate oppression of women and a disproportionate limitation on the place of women in the military.

*J.E.B. v. Alabama*<sup>219</sup> might have been decided differently in the absence of the assumption that *all* legal distinctions between the sexes invariably perpetuate historical discrimination against women. In *J.E.B.*, the Court prohibited peremptory challenges of jurors based on sex, finding that they “ratify and

---

<sup>216</sup> MacKinnon, *Reflections*, *supra* note 139, at 1292.

<sup>217</sup> Law, *supra* note 91, at 1010.

<sup>218</sup> *Id.* at 1033.

<sup>219</sup> 511 U.S. 127 (1994).

perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women."<sup>220</sup>

The opinion relied on an extensive discussion of historical prohibitions against women's jury service, describing the respondent's position in favor of sex-based peremptories as "reminiscent of the arguments advanced to justify the total exclusion of women from juries."<sup>221</sup> As with race, sex-based peremptories "reinforce the same stereotypes about the group's competence or predispositions that have been used to prevent them from voting, participating on juries, pursuing their chosen professions, or otherwise contributing to civic life."<sup>222</sup>

If the Court was identifying historical and archaic forms of discrimination that "have wreaked injustice,"<sup>223</sup> however, it could not have been relying on injustices against white men. In *J.E.B.*, *men* were struck from the jury panel because the plaintiff presumably believed women would be more favorable to her claim for paternity and child support. Instead of limiting the scope of its analysis to reasons why women might be excluded from juries, the Court could have given more attention to reasons why women jurors might be *preferred*.<sup>224</sup>

Professor Roberta Flowers believes the Court made the fundamental assumption that sex-based peremptory challenges, even when applied to men, "are degrading to women."<sup>225</sup> The Court's connection between women's historical exclusion from juries and present-day peremptory challenge, however, was flawed. The former was based on protectionism, but the latter is based on utility. Women are not disproportionately excluded from juries by peremptories; instead, research shows that men are more likely to be struck.<sup>226</sup> Professor Flowers concluded that "[i]n reality, women are not being told they are unqualified jurors, but rather that they are actually preferred."<sup>227</sup>

Not every difference between men and women is a mere stereotype, and not every classification drawn on the basis of sex is demeaning to women. In *J.E.B.*, the Court characterized the peremptory challenges at issue as based on

---

<sup>220</sup> *Id.* at 131.

<sup>221</sup> *Id.* at 138.

<sup>222</sup> *Id.* at 141 n.14.

<sup>223</sup> *Id.* at 140.

<sup>224</sup> *See id.* at 160 (Scalia, J., dissenting) ("Women were categorically excluded from juries because of doubt that they were competent; women are stricken from juries by peremptory challenge because of doubt that they are well disposed to the striking party's case.").

<sup>225</sup> Roberta K. Flowers, *Does It Cost Too Much? A 'Difference' Look at J.E.B. v. Alabama*, 64 *FORDHAM L. REV.* 491, 531 (1995).

<sup>226</sup> *Id.* at 513-14.

<sup>227</sup> *Id.* at 514.

“gender stereotypes” about jurors’ attitudes.<sup>228</sup> But are they based on stereotype or are they based on reality? Are they mere stereotypes about the different attitudes of men and women or, like the different reactions that male and female servicemembers have to the exclusionary policy, do they reflect a sex-based understanding of the different sexual behavior of men and women? Would the women jurors in *J.E.B.* have an expertise concerning the distinctiveness of male sexual behavior that would make them more knowledgeable jurors in a paternity dispute?

If the relevant differences between men and women are something more than mere stereotype, then any resulting legal classification should avoid the objection that stereotypes cannot be justified simply by their accuracy. “[G]ender classifications that rest on impermissible stereotypes violate the Equal Protection Clause, even when some statistical support can be conjured up for the generalization.”<sup>229</sup> But it must go too far to describe an absence of sexual or violent pathology in groups of women as “a mere stereotype.” Professor Flowers argued that “[i]f men and women are different as jurors . . . the Equal Protection Clause should not require litigants to disregard these differences for the sake of an institutional good.”<sup>230</sup> In the same way, if men and women are different with respect to the military’s asserted rational basis for excluding gay servicemembers, equal protection law should not require that those differences be disregarded for the sake of superficially equal treatment.

Yet women—both military and civilian—have responded to the disproportionate impact of the exclusionary policy in strange fashion. Rather

---

<sup>228</sup> *J.E.B. v. Alabama*, 511 U.S. at 137.

<sup>229</sup> *Id.* at 140 n.11. Statistical justification was also at issue in *Craig v. Boren*, 429 U.S. 190 (1976). The Court dismissed the importance of statistics showing that two percent of men in the relevant age group had been arrested for drunk driving, while only 0.18 percent of their female counterparts had been arrested: “Certainly if maleness is to serve as a proxy for drinking and driving, a correlation of 2% must be considered an unduly tenuous ‘fit.’” *Id.* at 201–02.

Perhaps the Court could have made a different statistical comparison in *Craig v. Boren*. Using the same figures, to the extent an additional drunk-driving risk to the community is introduced by the sale of alcohol to young people between the ages of 18 and 21, that risk is almost entirely male (about 95%). *See id.* at 201 (describing statistics presented to the Court). As with the sex-neutral exclusion of all gay servicemembers, *Craig v. Boren* also raises the question whether women should be restricted to avoid harms introduced almost entirely by men. The sex-based distinction invalidated in *Craig v. Boren*, however, is much less justifiable, because women engage in the same conduct of drunk driving as do men, even if to a lesser extent. The justifications for excluding gay servicemembers are much more starkly male, based on conceptions of distinctively male sexual behavior.

<sup>230</sup> Flowers, *supra* note 225, at 515 (footnote omitted).

than standing on the distinctive contribution gay women have made to the military, they largely deny that the contribution was made at all. In the view of women opposing the policy, military women are not generally accused of being gay because they *are* gay; instead, military women are most often accused in retaliation for refusing the sexual advances of men. "This is the dilemma that is faced by all military women. If you report sexual harassment, you run the risk of being charged as a lesbian and being criminally investigated for the harasser's misconduct."<sup>231</sup> In other words, the policy excluding gay women from the military is fundamentally a heterosexual issue.

This "heterosexualization" of military women can be detrimental to all military women. Not only has it made the service of gay women invisible, even though they have carried the burden of women's military duty, it has tended to trivialize the place of all women in the military. The more women attempt to heterosexualize military women, the more they fall into stereotypical efforts to make servicewomen appear hyper-feminine and sexually attractive to men. Inevitably the result will be to diminish the seriousness of their service and the worth of their accomplishments.

Efforts to make military women seem overwhelmingly heterosexual have run in cycles. During World War II, senior women officers set out "to assure an anxious public that servicewomen had not lost their 'femininity.'"<sup>232</sup>

[A]ttempts to limit the visibility of lesbians in the women's corps were linked with the implicit encouragement of heterosexuality. In responding to fears that the military would make women "mannish" or would provide a haven for women who were "naturally" that way, for instance, some army propaganda highlighted the femininity of WAAC/WAC recruits and stressed their sexual attractiveness to men.<sup>233</sup>

---

<sup>231</sup> *House Armed Services Hearings*, *supra* note 1, at 17 (testimony of former Captain Tanya Domi). Captain Domi, who is gay and a former company commander, testified about her own experience with retaliatory accusations. She reported a "fellow officer" for making a "explicit sexual proposition" to her in the presence of a junior officer, and the fellow officer responding by accusing her of being gay. *See id.* Of course, only the accusation against Captain Domi was investigated. *See id.* The incident, though, was unusual. It is not clear why Captain Domi, a commanding officer, would not have directly squelched a sexually explicit comment by an officer of presumably equal rank, particularly when the disrespectful comment was made in the presence of a junior officer. For a discussion of the role that women's agency should play in legal depictions of sexual harassment, see Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995).

<sup>232</sup> Meyer, *supra* note 19, at 584.

<sup>233</sup> *Id.* at 585. The military was walking a very fine line here. Emphasis on the sexual

The most comprehensive historical treatment of women's military service, written by retired Major General Jeanne Holm, insisted that gay women did not serve in disproportionate numbers during World War II. To contend otherwise was nothing but "a slander campaign."<sup>234</sup> All recognition of their distinctive contribution was erased by General Holm's incredible and unsupported conclusion that the percentage of gay military women was "probably much less than in the general female population."<sup>235</sup> Her belief was either naive or deceptive, and in any event contrary to the military's own internal policy choices concerning the service of gay women.

Similar public relations efforts prevail today, and from sources where one might least expect them. Professor Judith Stiehm, while otherwise advocating expanded roles for military women, has criticized the utilitarian and "uniform" nature of women's uniforms.<sup>236</sup> She contended that the military has never taken into account "what would become a woman."<sup>237</sup> Professor Stiehm's picture of what would flatter a military woman required more makeup, longer hair, and liberal amounts of jewelry,<sup>238</sup> even though all three would be safety hazards when working, for example, in the vicinity of jet engines.

The sexual attractiveness of servicewomen—and the importance of makeup—also played a prominent role in another military scholar's treatment of women's performance in the Persian Gulf War. In a narrative told by Professor D'Ann Campbell, a servicemember temporarily discarded her hyper-feminine appearance to circumvent United States-imposed restrictions on women drivers in Saudi Arabia:

At least one woman, whose overall efficiency was significantly hampered by this ruling [restrictions on driving by women], resolved to beat the system. She cut her hair, wore no make up, used a man's watch and sunglasses, and saluted Saudi guards in a manly fashion (women tend to look Military Police in the eye; men tend to give them a quick salute and sideways glance). She was never

---

attractiveness of military women (to men) also led to corresponding suspicion that they were heterosexually promiscuous. *Id.* at 585–86.

<sup>234</sup> HOLM, *supra* note 18, at 69.

<sup>235</sup> *Id.* at 70.

<sup>236</sup> Stiehm, *supra* note 161, at 159. Paradoxically, another source describes servicewomen's uniforms as cut "to cling," "confining," and "revealing." Michelle M. Benecke & Kirstin S. Dodge, Recent Developments, *Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215, 237 (1990). This description I completely fail to understand; it would require very creative tailoring to make women's uniforms sexually suggestive. The description is even more puzzling because the first of the two co-authors of the article is a military veteran.

<sup>237</sup> Stiehm, *supra* note 161, at 159.

<sup>238</sup> *Id.*

stopped despite driving her vehicles hundreds of miles<sup>239</sup>

This scheme was characterized as one of several “ingenious but often compromising solutions” devised by “[w]omen in leadership positions.”<sup>240</sup> I assume it was thought “compromising” because the servicewoman had to give up a degree of attractiveness to men, but left unexplained is the question of why that attractiveness was so important. A servicewoman who brings makeup *to combat duty in a war zone* does not belong there.<sup>241</sup>

The 1993 congressional controversy over gay servicemembers prompted renewed efforts to affirm the heterosexuality of servicewomen. The Assistant Secretary of the Navy, Barbara Pope, was unintentionally comical when she tried to explain to an organization of women naval officers why the ban on gay servicemembers was an issue completely separate from the concerns of military women.

Obviously, the issue of gays in the military is going to be important. My concern is how the gay issue is getting rolled up with the women’s issue. The timing was lousy. All of a sudden, women and gays were getting rolled up together. Which of course isn’t the same. We’re both in uniform—but being female is not the same as being gay.<sup>242</sup>

What followed Assistant Secretary Pope’s remarks was “[n]ot just a ripple but a wave of nervous laughter.”<sup>243</sup> These World War II-style reassurances of heterosexuality sounded much the same as they did fifty years earlier, but perhaps they were more difficult to carry off with a straight face.

I believe it is this same desire to heterosexualize military women that leads

---

<sup>239</sup> Campbell, *supra* note 44, at 79.

<sup>240</sup> *Id.*

<sup>241</sup> A recent article by Professor Mary Anne Case argued that legal protection against discrimination on the basis of sex should also protect women (and men) who engage in stereotypically feminine behavior. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 69–75 (1995). “It is my contention that, unfortunately, the world will not be safe for women in frilly pink dresses—they will not, for example, generally be as respected as either men or women in gray flannel suits—unless and until it is made safe for men in dresses as well.” *Id.* at 7. My concern is that this contention could encourage an overvaluation of hyper-feminine behavior, even when that hyper-feminine behavior is dysfunctional or is valued primarily because of its sexual attractiveness to men. In the military environment, the recent emphasis on stereotypical indicia of heterosexuality in servicewomen has not been to their benefit.

<sup>242</sup> ZIMMERMAN, *supra* note 148, at 199.

<sup>243</sup> *Id.*



opponents of the policy excluding gay servicemembers to tie the gay ban to issues of sexual harassment. Rather than questioning whether any of the justifications offered for excluding gay servicemembers apply to women, feminist advocates rely on the premise that women are accused for reasons other than actually being gay.<sup>244</sup> The former requires recognition that gay women do serve, and in disproportionate numbers; the latter retains the illusion of heterosexuality while allowing opponents of the policy to free-ride on the public attention paid to sexual harassment in the military in the wake of Tailhook.<sup>245</sup>

As a result, the exclusionary policy is characterized as a problem for straight women as much as it is for gay women, and perhaps even more so, as straight women would be more likely to find themselves in positions of vulnerability to men. One witness referred to the ban on gay servicemembers as "the atomic bomb tool of sexual harassment."<sup>246</sup> Another testified it was "a frequent occurrence" that men would make allegations of homosexuality against women who refused their sexual advances.<sup>247</sup>

Although it is theoretically possible that the exclusionary policy could be used to retaliate against straight military women who resist sexual harassment, it misrepresents the actual impact of the policy to characterize it in that manner. The servicewomen who are most at risk under the policy are at risk because they are gay, not because they are women potentially subject to sexual

---

<sup>244</sup> Even Professor Stiehm, who recognizes that the justifications offered in support of the exclusionary policy relate only to men, assumes that most women are alleged to be gay for reasons other than that they are gay. "[T]he strong, independent, short-haired, no makeup-wearing woman who wears men's clothes, radiates confidence, and is seen as a topnotch troop is also likely to be seen as a possible lesbian." Stiehm, *supra* note 161, at 158. It would be more accurate to say that this strong, independent, short-haired, no makeup-wearing, uniform-clad, topnotch troop probably is a lesbian. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 95-99 (1995). Professor Valdes argued that stereotypical confusion between social gender and sexual orientation led a Navy admiral, *see supra* note 29 and accompanying text, to assume that "hard-working, career-oriented" women who were "among the command's top professionals" were also gay. "[T]he admiral's juxtaposition of social gender masculinity with lesbian identity betrays his conflatory association of social gender atypicality with sexual gender atypicality—his association of cross-gender social attributes with members of sexual minorities." Valdes, *supra*, at 99. The possibility or probability that the Navy Admiral was correct in his assumption was not considered.

<sup>245</sup> See generally ZIMMERMAN, *supra* note 148.

<sup>246</sup> *House Armed Services Hearings*, *supra* note 1, at 33 (testimony of former Captain Tanya Domi).

<sup>247</sup> *Senate Hearings*, *supra* note 1, at 428 (testimony of Professor Judith Stiehm).

harassment. An accusation of homosexuality constitutes the most effective threat when the accusation is true.

## VI. CONCLUSION

A recurring problem in the debate over the military's treatment of gay servicemembers is the tendency of the participants to misrepresent the actual lives of gay servicemembers. For example, in arguing that gay servicemembers are excluded for their mere "status" as gay citizens and not their "conduct," lawyers have misrepresented gay military plaintiffs as having no absolutely no interest in an intimate life.<sup>248</sup> The fact that they may live their lives in committed relationships becomes legally invisible and irrelevant.

The distinctive historical role of gay women in military service suffers from the same invisibility. Although the congressional debate on the "Don't Ask, Don't Tell" policy was a discussion by men about the behavior of men serving in groups of men, no one noticed when the result was a law that would inevitably and disproportionately burden the careers of military women. Rather than standing on the special contribution of gay military women and asking why a rational basis that is relevant only to men should be used to exclude them, opponents adopted a strategy that seemed more palatable but was just as misrepresentative as the distinction between status and conduct.

When the military's exclusionary policy is applied to women, it presents a circumstance unlike almost any other. Women are disproportionately burdened in an effort to reduce harms that are purportedly caused by and affect only men. Equal protection law can be broad enough to protect gay women from that disproportionate burden, particularly when the effect of the policy is to exclude them from an institution that they have disproportionately served. Unlike almost every other circumstance in which women have sought full participation alongside men, the only way to respect the distinctive service of gay women in the military is to re-make a distinction on the basis of sex.

---

<sup>248</sup> See generally Mazur, *supra* note 12 (arguing that the artificial legal distinction between status and conduct is factually inaccurate, demeaning, and counterproductive).